Supreme Court, U.S.
FILED

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97 906 NOV 20 1997

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

LEANNA C. BLANKENSHIP,
Petitioner,

v.

PARKE CARE CENTERS, INC., doing business as Barbara Parke Convalescent Center, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a plaintiff who is bringing a co-worker hostile environment sexual harassment claim prove that her employer ***intentionally discriminated*** against her by exhibiting ***deliberate indifference*** to her complaints of harassment before liability may properly be imposed on that employer?

2. May an employer avoid liability in a Title VII hostile environment simply because that employer acted in "good faith?"

PARTIES TO THE PROCEEDING

Petitioner Leanna C. Blankenship was the plaintiff/appellant in the proceedings before the Sixth Circuit Court of Appeals. Parke Care Center, Inc. and Westchester Management Company were the defendants/appellees before the Sixth Circuit Court of Appeals.

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OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit affirming summary judgment on behalf of the defendants/appellees is reproduced in the petitioner's appendix as Appendix A. The Order of the United States District Court for the Southern District of Ohio, Western Division, granting summary judgment to the defendants is reproduced in the petitioner's appendix as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1997. (A2) This petition is being timely filed within ninety (90) days of the date the Court of Appeals entered its judgment. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute at issue in this petition is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Appendix C)

STATEMENT OF THE CASE

Overview

This petition is being filed because, in its opinion below, the Sixth Circuit dramatically altered over a decade of jurisprudence in the area of hostile environment sexual harassment by requiring an employer to evince some type of

intent before it may be held liable for co-worker sexual harassment. Such a holding has no statutory basis, is contrary to the holdings of every other federal circuit court, and is in fact in direct conflict with this Court's guidance in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986) that federal courts should look to agency principles to determine employer liability in hostile environment sexual harassment cases.

The facts relevant to this petition are set forth in the Sixth Circuit's opinion attached hereto at A1, and petitioner submits that the facts set forth in that opinion amply demonstrate that, if the Sixth Circuit would have utilized the correct standard for determining employer liability, and then properly applied that standard to the facts, petitioner has, at a minimum, established a jury question as to whether the employer should be held liable for the acts of sexual harassment committed by one of its employees.

Petitioner Leanna Blankenship, a white female, was 17 years old when she began working at Barbara Parke Nursing Home ("Parke")[1] (A3). Blankenship began working at Parke on September 13, 1993, as a dietary aide in connection with a work-study program through her high school. (*Id.*) Six weeks before Blankenship began working at Parke, Walter Malcom ("Malcom") was hired as a janitor. At the time Malcom was hired, Parke was aware that Malcom had a history of substance abuse and that he had been convicted of carrying a concealed weapon. (*Id.*) Malcom is an African-American male and, at the time in question, he was 37 years old.

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[1] Barbara Parke Nursing Home is a d/b/a utilized by defendant/appellee Parke Care Centers, Inc. Defendant/Appellee Westchester Management Company provides management services to Parke.

Soon after Blankenship began working at Parke, she experienced unwelcomed sexual advances from Malcom on at least five separate occasions, including four kisses on the cheek, a tickle, three hugs, and a statement from Malcom that he was "falling in love." (*Id.*) Blankenship complained to her immediate supervisor, Jacquelyn Sullivan ("Sullivan") about all of these incidents on October 3, 1993 and, at Sullivan's request, Blankenship even prepared a written statement detailing these incidents of sexual harassment on October 4. (*Id.*)

Parke's response to Blankenship's complaint was to assign Malcom to work on the garden level of the nursing home and to limit Blankenship's duties to the dietary aide area of the nursing home. Sullivan, Mamie Lee ("Lee"), who was Malcom's immediate supervisor, and various other members of management then attempted to periodically watch Malcom and Blankenship to see if they could catch Malcom or Blankenship engaging in inappropriate behavior. Parke labeled this as its "observation network." (*Id.*) Sullivan questioned the other members of the dietary staff, walked Blankenship to her car after work and regularly asked Blankenship if she was having any further trouble with Malcom. However, it is undisputed that Malcom was not disciplined ***nor was he even questioned*** by any member of management after Blankenship's first complaint. (*Id.*)

Approximately one week after Blankenship reported her first complaint to Sullivan, Blankenship suffered a further incident in which Malcom came up from behind her and grabbed both of her breasts. Blankenship immediately reported this incident to Sullivan and Sullivan responded by saying "she would see what could be done." (A4) While Parke was deciding "what could be done," Malcom approached Blankenship once again and asked her out; Blankenship declined.

On October 17, Blankenship delivered another written report to Sullivan detailing the incident in which Malcom asked her out. (A4) On this same day, Sullivan received a complaint from another female student dietary aide, Amy Marshall, who also complained of unwelcome and lewd touching, gestures, and language on the part of Malcom. (*Id.*)

Finally, on October 18, after two complaints from Blankenship, and another complaint from Ms. Marshall, Parke's management met with Malcom and confronted him with the two female employees' allegations. (A5) Malcom denied any wrongdoing. Parke's management then issued Malcom a written statement warning him that any further incidents would result in his termination. (*Id.*)

However, on October 22, only four days later, Blankenship again reported to Sullivan that Malcom "kept coming around her." Blankenship was visibly upset and asked permission to leave early from work. (*Id.*) Sullivan contacted Alice Kalota ("Kalota"), the Chief Administrator of the nursing home, and asked if Blankenship could clock out early and go home. Kalota approved Blankenship's request. (A39)

Blankenship called her mother, Linda Murray ("Murray") to come pick her up. When Murray arrived at the nursing home, she and Blankenship went to the time clock area. Malcom's supervisor, Lee, saw Blankenship crying and trembling as she was clocking out and asked what was wrong. Blankenship and Murray sat down with Lee in the hallway and explained the situation. Murray told Lee that she was afraid for her daughter's safety and that although Blankenship loves her job, she should not have to be afraid to come to work. Murray also explained that she was having difficulty obtaining copies of the written complaints which Blankenship had lodged against

Malcom. Lee listened patiently and then hailed Kalota and asked her to join the discussion. (*Id.*)

Murray explained to Kalota that she was concerned about her daughter's safety. Kalota refused to discuss the situation with Murray and told Blankenship that if she had a problem, Blankenship should make an appointment with her to discuss it. (*Id.*)

As suggested by Kalota, Blankenship walked over to Kalota's office and began making an appointment on Kalota's schedule. Kalota yelled at Blankenship, "Leanna, get in my office," grabbed Blankenship by the arm, jerked her into the office and shut the door.

Inside the locked office, Kalota, Sullivan and the Director of Nursing, Judith Fadden ("Fadden"), began questioning Blankenship. Blankenship continued to sob and repeated that Malcom kept coming around her, that she did not want to be around him, and that she wanted to leave for the day. Kalota informed Blankenship that she could not guarantee that Blankenship would not have contact with Malcom. (A12) If Blankenship could not accept this fact, Kalota informed her that she would have to resign. (*Id*)[2] Blankenship, still visibly upset and shaken, repeated to Kalota that she only wanted to leave for the day. Kalota replied by telling Blankenship that if she left for the day, it would amount to a voluntary quit. Kalota then handed Blankenship a piece of paper and a pen and instructed her to write out the words: "I, Leanna Blankenship, hereby resign." Kalota instructed Blankenship to sign the piece

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[2] It bears noting at this point that Kalota's ultimatum to Blankenship apparently has as its premise that Parke's "observation network" and its attempt to separate Malcom from Blankenship could not be successful.

of paper and Kalota then physically escorted Blankenship and her mother out of the building.

Thus ended Blankenship's employment as a student dietary aide at Parke.

Description of the Proceedings

The three judge panel of circuit judges Engel, Merritt, and Ryan decided the case for the Sixth Circuit. These three judges produced three separate opinions. Circuit Judge Engel delivered the opinion of the court in which Judge Merritt concurred in the result and the reasoning. Judge Ryan concurred in the result only.

A) Judge Engel's Opinion for the Court

Delivering his opinion for the court, Circuit Judge Engel began his analysis by recognizing that, because Malcom was employed as a janitor at Parke and had no supervisory authority over Blankenship, he was merely Blankenship's co-worker. Accordingly, before Parke could be held liable for any acts of sexual harassment committed by Malcom, Blankenship had to show that "Parke knew or should have known of the charged sexual harassment and failed to implement prompt and corrective action." (A7) The Sixth Circuit referred to this type of liability as "direct liability" and further held that respondeat superior liability had no applicability to this situation. In fact, missing entirely from the court's opinion is any discussion of agency principles and how those principles might lead to employer liability. This is because, at least according to the Sixth Circuit, an employer must "intentionally discriminate" to be liable under Title VII. (A9)

Recognizing that Parke was indisputably on notice of Blankenship's complaints of harassment, the court focused on the appropriateness of Parke's response to these complaints. However, instead of determining whether or not Parke's response was reasonably calculated to end the harassment, the Sixth Circuit analyzed whether Parke's response "manifest[ed] indifference" to Blankenship's complaints. (A8) Indeed, the court found that "reasonableness" did not enter into the equation at all, as it reasoned that an employer is shielded from liability as long as it makes a "good-faith response." (A9) Specifically, the court held:

> Once an employer is aware of and responds to charges of sexual harassment, . . . mere negligence as to the content of the response cannot be enough to make the employer liable. When an employer responds with good-faith remedial action, we cannot say that the employer has itself committed an act of discrimination.
>
> * * *
>
> When an employer implements a remedy, it can be liable for sex discrimination in violation of Title VII only if that remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination. (A10-11)

The majority contrasted this standard of liability with the employer's duty to discover the existence of harassment. Citing its earlier decision in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), the court found that "negligence as to the existence of harassment" can create liability for the employer.

Thus the court created a dual standard for employer liability: negligence as to the existence of harassment versus deliberate indifference in tailoring a remedy for the harassment. As the court stated:

> In sum, although negligence as to the existence or harassment may be enough, under *Rabidue*, for an employer to incur liability for discrimination, negligence in the fashioning of a remedy is not. (A10)

However, conspicuously absent from the Sixth Circuit's opinion is any legal justification for this dual standard or any legal support for this newly created "good-faith" standard as the bench mark for responding to complaints of sexual harassment. As discussed in detail below, petitioner submits that no such legal support exists.

B) Concurrence of Judge Merritt

Circuit Judge Merritt concurred in the result and the reasoning of Judge Engel. Judge Merritt candidly admitted that "employer liability for co-worker sexual advances is hard to get a good handle on" (A16), but nonetheless agreed that an employer needs to exhibit "deliberate indifference" before it may properly be held liable in such situations. (A15)

C) Concurrence of Judge Ryan

Circuit Judge Ryan concurred in the result only because he believed that Parke acted "reasonably" to Blankenship's complaints. (A17) He utilized his concurring opinion to criticize the majority's adoption of a "good-faith" standard for evaluating an employer's response to a complaint of sexual harassment. He also plainly indicated his disagreement with the majority's requirement that an employer must intentionally discriminate against a plaintiff in a co-worker sexual harassment case to be liable. Judge Ryan stated:

> It is simply not the law that an employer's liability for sex discrimination under Title VII require proof that the **employer** himself, herself, or itself is guilty of sex discrimination. (A17) (emphasis in original).

Instead, Judge Ryan stated that negligence on the employer's part is sufficient to impose liability. As support for his interpretation, Judge Ryan cited numerous opinions from other federal circuit courts and further relied on this Court's opinion in *Meritor Savings Bank v. Vinson, supra*.

Although Judge Ryan arguably applied what petitioner submits is the correct legal standard, he failed completely to attempt to explain how Parke's response to Blankenship's complaints were "reasonable" and petitioner submits that he badly misapplied the applicable law to the facts presented, especially considering the fact that this case was decided upon a motion for summary judgment.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Opinion In This Case Cannot Stand Because, Within The Parameters Of The Sixth Circuit, It Effectively Abrogates Over A Decade Of Hostile Environment Sexual Harassment Precedent And Because Employers Within The Sixth Circuit Can Now Legally Take Any Action They Choose In Response To A Complaint Of A Sexually Hostile Work Environment, Regardless Of Whether That Action Is Effective Or Even Reasonable, And Still Escape All Liability As Long As Their Action Was Taken In "Good Faith" And Does Not Evince "Deliberate Indifference."

In *Meritor Savings Bank v. Vinson, supra,* this Court first recognized that a sexually hostile or abusive work environment violates Title VII. 477 U.S. at 66. In comparing sexual harassment to racial harassment, this Court quoted the following language from *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) with approval:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as

> demeaning and disconcerting as the harshest of racial epithets.

Id. at 67. (citations omitted). Although this Court declined to issue an definitive ruling requiring the appropriate standard for employer liability in hostile environment cases "given the state of the record" in that case, this Court did state:

> We do agree with the EEOC that Congress wanted courts to look to agency primarily for guidance in this area.

Id. at 72. Indeed, expressly because traditional, common-law principles of agency are to be applied in this area, this Court further stated in *Vinson* that "absence of notice to an employer does not necessarily insulate that employer from liability." *Id.*

Since *Vinson*, this Court has not provided any further guidance as to the scope of an employer's liability for hostile environment sexual harassment. However, following *Vinson*, the federal courts of appeal have been almost unanimous in holding that, once an employer is on notice of offensive conduct, that employer must take ***reasonable*** steps to stop the harassment. *See, e.g., Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995) (holding that if "the remedy attempted is ineffectual, liability will attach); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2nd Cir. 1987) ("[W]hether the employer has taken reasonable steps to eliminate such offensive conduct present[s] questions of fact to be determined in each case.") *Spicer v. Commonwealth of Va. Dep't of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995) ("[W]e have consistently held that an employer is only liable for sexual harassment committed by its employees if no adequate remedial action is taken."); *Jansen v. Packaging Corp. of America*, 123 F.3d 487, 502, (7th Cir.

1997) ("[T]he law should not exhibit patience with an employer that permits harassment, once reported, to reach the point which it creates a hostile work environment.") *Ellison v. Brady*, 924 F.2d 872,883 (9th Cir. 1991) ("To avoid liability under Title VII, employers may even have to remove employees from the workplace if their mere presence would render the working environment hostile.") Indeed, even the Sixth Circuit in *Rabidue, supra*, held that an employer will be liable if it "failed to implement prompt and appropriate corrective action." 805 F.2d at 621. The Equal Employment Opportunity Commission regulations pertaining to this issue are in accord with the above case law:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. 29 C.F.R. § 1604.11(d).

Clearly, the theme running through all of the above legal authority is whether the remedial actions taken by the employer were "reasonably likely to prevent the misconduct from recurring," *e.g. Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860, 867 (11th Cir. 1997) and the touchstone of this analysis is whether the employer was negligent. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995) ([It is clear, the criterion for when an employer is liable for sexual harassment is negligence . . . .) A negligence standard is also the only

standard that is consistent with this Court's directive in *Vinson* that the lower courts should apply agency principles. In fact, *Section 219(2)(b) of the Restatement (Second) of Agency* provides in relevant part:

> (2) A master is not subject to liability for the fault of his servants acting outside the scope of their employment, unless:
>
> * * *
>
> (b) the master was negligent or reckless . . . .

See also, Bouton v. BMW of North America, 29 F.3d 103, 107 (3rd Cir. 1994) (Applying § 219(2)(b) to determine liability of employers in hostile environment sexual harassment cases); *Accord, Hirschfield v. New Mexico Corrections Dept.*, 916 F.2d 572, 576-77 (10th Cir. 1990).

In sum, there is absolutely no legal support for the Sixth Circuit's holding in this case that an employer has to intentionally discriminate against an employee by manifesting a "deliberate indifference" to that employer's complaint of sexual harassment before that employer may properly be held liable under Title VII. Indeed, such a relaxed standard has been reserved by this Court to apply only to the potential violation of constitutional rights by governmental authorities. *See Canton v. Harris*, 489 U.S. 378, 392 (1989) (holding that § 1983 claims are only cognizable where the municipality "reflects deliberate indifference to the constitutional rights of its inhabitants") and *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that only "deliberate indifference to serious medical needs of prisoners" constitutes a constitutional violation).

Similarly, the newly-created "good-faith" standard enunciated by the court below smacks of the same standard announced by this Court in *United States v. Leon*, 468 U.S. 897, 922-24 (1984) (holding that Fourth Amendment's exclusionary rule does not require suppression of evidence acquired by an invalid warrant unless the law enforcement officer was not acting in "good-faith" when relying on the warrant). It simply cannot be the law that an employee alleging a violation of Title VII should be held to the same standard of proof required to show a constitutional violation such as in prisoner rights cases, yet that is exactly the standard the Sixth Circuit is now requiring of employees in this circuit.

Another fundamental problem with the Sixth Circuit's opinion is highlighted by the specific facts of this case. It is undisputed in this case that Parke's response to Blankenship's complaints of harassment, i.e., the establishment of an "observation network" and the attempt to separate Blankenship from her harasser, were woefully unsuccessful in keeping Malcom away from her. Both of these actions were taken by Parke after Blankenship made her first complaint. Nonetheless, the most egregious sexual harassment suffered by Blankenship (which consisted of Malcom coming up from behind her and grabbing both her breasts), did not occur until ***after*** she made her first report of harassment. After the breast-grabbing incident, the facts are further undisputed that Blankenship then registered another formal complaint with Parke, both orally and in writing, while at approximately the same time, co-worker Marshall also made a report of sexual harassment against Malcom. Clearly, the remedial measures taken by Parke had not been effective and Parke was fully aware that its actions had been ineffective.

Then, when Blankenship complained, on what turned out to be her last day of work, that Malcom "kept coming

around her," Administrator Kalota not only failed to assure Blankenship that the nursing home would take care of the situation, she instead virtually assured Blankenship that there was nothing the nursing home could do to separate Blankenship from her harasser. To make matters worse, Kalota then instructed Blankenship to resign if she could not tolerate further contact with Malcom. In short, Blankenship informed Parke that its efforts to curb the harassment were ineffective, Parke nonetheless failed to even attempt to take any additional corrective action, and then, incredibly, instructed her that she had to resign if she could not accept Parke's failure to keep her harasser away from her.

Petitioner submits that, while there are several adjectives to describe Kalota's response on this date, "reasonable" is not one of them. Even Judge Engel acknowledged that "[t]he most troubling facts of this case are those surrounding Blankenship's resignation." (A11) Nevertheless, he reasoned that Kalota's response was made in "good-faith" and that it did not "evidence the kind of discriminatory conduct . . . necessary to support the charge against it." (A13)

If Parke's response in this case was insufficient ***as a matter of law*** to impose liability on the employer, it is difficult for petitioner to understand how any employer in the Sixth Circuit can be held liable for co-worker sexual harassment as long as that employer takes ***some*** action in response to a complaint, regardless of whether that action is even remotely effective.

In short, the legal precedent established below should not be allowed to stand and provides a compelling basis for this Court to grant certiorari.

II. This Court Should Grant The Writ To Provide Much-Needed Guidance To The Lower Federal Courts In Determining The Parameters Of Employer Liability In Hostile Environment Sexual Harassment Cases.

This Court has decided only two hostile environment sexual harassment cases: *Meritor Savings Bank v. Vinson, supra*, and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Unfortunately, neither of these cases provide much guidance in determining when an employer may be held liable in these type of claims. As discussed above, *Vinson* simply acknowledged the existence of such claims and counsels the lower courts "to look to agency principles for guidance in this area." 477 U.S. at 72. *Harris* provides no additional help in this area as it deals solely with the proper definition of what constitutes a "hostile work environment" under Title VII. 510 U.S. at 18.

Although the vast majority of the courts, with the prominent exception of the Sixth Circuit in this case, have heeded this Court's advice in *Vinson* to apply agency principles in hostile environment sexual harassment cases, such principles have turned out to be somewhat difficult to apply in practice as the *Restatement of Agency* deals primarily with torts committed by employees within the scope of their employment. *See Restatement (Second) of Agency* § 219(1) (1958). Obviously, sexual harassment is generally not within the scope of most employees' employment. This fact led one court to observe:

> Confining liability . . . to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become

> accountable only if they explicitly require or consciously allow their supervisors to molest women employees.

Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417-18 (10th Cir. 1987). *See also Jansen v. Packaging Corp of America, supra*, 123 F.3d at 497. ("In my judgment, reliance on the *Restatement* in [the sexual harassment setting] is the type of formalism that does not get us far in practice."); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (stating in race discrimination case: "It would be the rare case where . . . harassment against a co-worker could be thought by the author of the harassment to help the employer's business.")

The *Restatement* does contain two other sections which could potentially be relevant in determining the scope of employer liability in sexual harassment cases. Section 219(2) reads in relevant part:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . .
>
> (b) the master was negligent or reckless, or
>
> . . . .
>
> (d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the

> tort by the existence of the agency relation.

These sections have been cited by various circuit courts as being applicable in hostile environment claims. *See, e.g.. Hirschfield v. New Mexico Corrections Dept.*, 916 F.2d 572, 576 (10th Cir. 1990) and *Bouton v. BMW of North America*, 29 F.3d 103, 106 (3rd Cir. 1994).

However, numerous questions still abound. Do the exceptions set forth in the *Restatement* establish the universe of employer liability in hostile environment sexual harassment situations? Does there exist a legal distinction between hostile environment sexual harassment perpetrated by a supervisor as opposed to that perpetrated by a co-worker? Where the allegations of sexual harassment are particularly severe, such as allegations of physical touching or threats, must an employer remove or reassign the harasser to a different workplace if the harasser's continued presence would render the working environment hostile? If the employer's response is ineffective to stop the harassment, is the employer liable? If the employer knows or has reason to know that its response is ineffective to stop the harassment, but takes no further action, is the employer liable?

The lower courts have grappled with these issues for over a decade without any guidance from this Court and some courts are now openly asking for assistance. As the court in *Jansen v. Packaging Corp. of America, supra*, stated:

> Perhaps in some future case this court will be able to form a majority position; perhaps the Supreme Court will bring order

> to the chaotic case law in this important field of practice.

Id. at 494-95. It bears noting that, in *Jansen*, the Seventh Circuit Court of Appeals, sitting *en banc*, splintered into ***eight separate opinions*** in attempting to decide the extent of employers' liability for sexual harassment. *See generally id.*

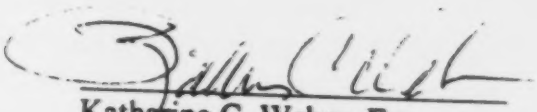
Similarly, in the present case, the Sixth Circuit authored three separate opinions in an attempt to explain why Parke was not liable for the sexual harassment suffered by petitioner. Indeed, Judge Merritt plainly stated that "[this area of employer liability for co-worker sexual advances is hard to get a good handle on . . . ." (A16.)

Thus, petitioner submits that it is time for this Court to issue a definitive ruling on employer liability in such situations and further submits that this Court should utilize this case as the vehicle to announce that ruling so that, in the process, the grave injustice which petitioner has suffered may also be corrected.

CONCLUSION

For all of the reasons set forth herein, petitioner Leanna C. Blankenship respectfully requests this Court to issue a writ of certiorari in this case.

Respectfully submitted,



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Date: November 19, 1997

APPENDIX A

No. 96-3084

Recommended for Full-Text Publication
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CAPTATION FED App. 0250P (6th Cir.)
File Name: 97a0250p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEANNA C. BLANKENSHIP, *Plaintiff-Appellant,*

AMY E. HELTON, formerly known as Amy E. Marshall, *Plaintiff,*

v.

PARKE CARE CENTERS, INC., doing business as Barbara Parke Convalescent Center, *Defendant-Appellee,*

WALTER MALCOM, *Defendant,*

WESTCHESTER MANAGEMENT

COMPANY,)
Defendant-Appellee.)

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 94-00538--Sandra S. Beckwith, District Judge.

Argued: December 5, 1996
Decided and Filed: August 22, 1997

BEFORE: ENGEL, MERRITT, AND RYAN, Circuit Judges.

COUNSEL

ARGUED: Katharine C. Weber, CORS & BASSETT, Cincinnati, Ohio, for Appellant. Mark J. Stepaniak, TAFT, STETTINIUS & HOLLISTER, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Katharine C. Weber, Curtis L. Cornett, CORS & BASSETT, Cincinnati, Ohio, for Appellant. Mark J. Stepaniak, Gregory P. Rogers, TAFT, STETTINIUS & HOLLISTER, Cincinnati, Ohio, for Appellee.

ENGEL, J. delivered the opinion of the court. MERRITT (pp. 13-14), and RYAN (pp. 15-18), JJ., delivered separate concurring opinions.

OPINION

ENGEL, Circuit Judge. Plaintiff Leanna Blankenship appeals the district court's grant of summary judgment to defendants Parke Care Centers, Inc., and Westchester Management Company (collectively "Parke") in her suit based on claims of sexual harassment, assault and battery, and intentional infliction of emotional distress. Blankenship alleged that the conduct of a fellow Parke employee created a hostile work environment. The district court held that regardless of the severity of that employee's conduct, Blankenship failed to establish the element of "respondeat superior" necessary to hold Parke liable. We affirm.

I.

Blankenship, then 17, was employed as a dietary aide at one of Parke's nursing homes as part of a work-study program through her high school. She started work on September 13, 1993, six weeks after Parke hired Walter Malcom, 37, as a janitor for the same nursing home. Parke knew that Malcom had a history of substance abuse and that he had once been convicted of carrying a concealed weapon. Soon after Blankenship started working, she experienced several unwanted sexual advances by Malcom. On October 3, she complained to her immediate supervisor, Jacquelyn Sullivan. At Sullivan's request, Blankenship prepared a written statement on October 4 that noted, in five separate incidents, a total of four kisses on the cheek, a tickle, three hugs, and a declaration by Malcom that he was "falling in love."

In response, Sullivan asked all the members of the dietary department if they had witnesses any of this behavior; they all said no. She met with Judith Fadden, the director of nursing, and Mamie Lee, Malcom's immediate supervisor. This group formulated an "observation network" designed to separate Malcom and Blankenship and to keep an eye out for trouble: Malcom's work area was moved to minimize his interaction with Blankenship. Lee was instructed to check on Malcom's whereabouts and behavior every so often and Sullivan was to keep Blankenship as close to the kitchen as possible, so that she would not be alone. As a result of Blankenship's complaint, Sullivan also began to walk her to her car after work. She also asked Blankenship at the end of every day if she had had any problems with Malcom. None of the administrators confronted Malcom in any way.

Within a week or so, Blankenship suffered a further incident in which Malcom grabbed her breast from behind. She mentioned this to Sullivan, who said she would see what could be done.[1] Then, apparently at a separate time, Malcom asked Blankenship if he could take her out; she declined.

On October 17, when she returned to work after a few days off, Blankenship filed another written complaint with Sullivan, in which she mentioned only that Malcom has asked her out--not the breast-grabbing incident. On the same day, Sullivan received a complaint from another dietary aide, Amy Marshall. Marshall complained of lewd touching, gestures, and language on the part of Malcom. Responding to these complaints, Alice Kalota, the chief administrator of the nursing

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[1] Parke disputes that this event happened and that Blankenship reported it to Sullivan, but recognizes that because the district court granted it summary judgment, the facts must be considered in the light most favorable to Blankenship.

home, along with Fadden and Lee, met with Malcom, who denied any wrongdoing. The administrators issued him the following warning on October 18:

> We have had two written complaint[s] against you for harassment by females. This your one & only warning. Harassment of any kind by an employee to another employee absolutely will not be tolerated. Any further occurr[e]nce will result in your immediate termination.

(J.A. at 406.)

On October 22, Blankenship became upset at work because Malcom "kept coming around" her. She spoke with Sullivan, who gave her permission to leave early. Blankenship's mother came to pick her up and unsuccessfully tried to discuss the situation with Kalota. Kalota ended up meeting with Blankenship, Fadden, and Sullivan. Blankenship said that no specific incident had occurred since Malcom asked to take her out but that he was "around" her and she did not want to be near him. Kalota told Blankenship that she could not guarantee that Blankenship could work without ever coming into contact with Malcom. If she could not accept that, Kalota said, Blankenship would have to resign. Blankenship chose to resign, and she went home for good.

Blankenship sued Parke on federal and state claims of sexual harassment based on a hostile work environment, and on state claims of assault and battery and intentional infliction of emotional distress; she did not sue for wrongful termination or

constructive discharge. The district court granted Parke's motion for summary judgment, holding that even if Blankenship could prove the substantive elements of a hostile work environment claim, she could not establish Parke's liability under the respondeat superior doctrine. The district court found no evidence to support the purely state law claims. Blankenship does not contest that finding; she appeals the court's holding only as to sexual harassment.

II.

We review the district court's grant of summary judgment de novo. *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 182 (6th Cir. 1992). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying Rule 56(c), we view the evidence in the light most favorable to the nonmoving party and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). Courts have recognized two types of workplace sexual harassment as constituting discrimination on the basis of sex: *quid pro quo* harassment, in which a supervisor requests sexual favors in exchange for job benefits, and "hostile work environment" harassment, in which a pervasive atmosphere of sexual harassment creates an objectively hostile

work environment. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 618-19 (6th Cir. 1986).[2] Blankenship has alleged the hostile work environment strain of sexual harassment. Hostile work environment cases distinguish between harassment by supervisors and harassment by co-workers. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803-04 (6th Cir. 1994). Because Malcom had no supervisory power over Blankenship, we will apply the law of co-worker harassment.

To prevail on her claim against Parke, Blankenship must show that (1) she is a member of a protected class; (2) she was subject to unwelcomed sexual harassment; (3) the harassment was based on her sex; (4) the harassment unreasonably interfered with her work performance and created a hostile work environment; and (5) Parke "knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir.) (quoting *Rabidue*, 805 F.2d at 621), *cert. denied*, 117 S. Ct. 170 (1996).

Although the district court strongly suggested that Blankenship's claim might fail on the fourth element, it rested its grant of summary judgment on the fifth element (hereinafter "the *Rabidue* standard"), which it labeled as "respondeat superior liability." We used to describe an employer's liability in this situation as arising under the respondeat superior doctrine, but now we have noted the inaccuracy of that characterization. *Pierce*, 40 F.3d at 804 n. 11. In co-worker harassment cases, the employer is liable, if at all, directly, not derivatively. *Id.; see also Fleenor*, 81 F.3d at 50.

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[2] One part of *Rabidue* was abrogated by *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), but the rest of the case is still valid law. *See, e.g., Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir.), *cert. denied*, 117 S.Ct. 170 (1996).

The *Rabidue* standard has two distinct parts. We need not concern ourselves with whether Parke "knew or should have known" of the alleged harassment. It is undisputed that Parke knew about Blankenship's complaints, with the possible exception of the breast-grabbing incident. We instead focus on whether Parke "failed to implement prompt and appropriate corrective action." The promptness of Parke's various responses to Blankenship's complaints was evident; the dispute centers on their appropriateness.

We find little guidance in *Rabidue* as to what standard we should use to measure the appropriateness of the corrective action, other than a directive to proceed on a case-by-case basis. 805 F.2d at 621. The origin of the phrase "appropriate corrective action" is an EEOC regulation that does not describe what sort of action is appropriate. 29 C.F.R. § 1604.11(d). *Rabidue* also relied on decisions from several other circuits. One of those, *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983), provided some guidance, noting that the corrective action must be "reasonably calculated to end the harassment." *Id.* at 256.

In *Bell v. Chesapeake & Ohio Railway*, 929 F.2d 220 (6th Cir. 1991), we applied the "prompt and appropriate corrective action" standard to a case of alleged racial harassment by an employee's co-workers. We noted that the appropriateness of a response depends on the frequency and severity of the alleged harassment. In affirming the dismissal of the plaintiff's case, we stated that although the employer's reaction to the alleged harassment was weaker than the plaintiff would have liked, the employer's actions did not manifest "culpable indifference" to the harassment. *Id.* at 225. The word "indifference" implies a more relaxed standard for employers than does *Katz's* statement that corrective action must be "reasonabl[e]." *Katz* appears to contemplate an objective standard, whereas *Bell* would be consistent with a subjective

standard. Neither case elaborates on the standard, though; indeed, *Bell* begs the ultimate question of what sort of "indifference" is "culpable."

In defining the employer's duties in the present case, we must keep in mind that the alleged harasser was not plaintiff's supervisor. When the harasser is a co-worker, the standard for determining employer liability is "markedly different" from that applicable to supervisors, and is not based upon the doctrine of *respondeat superior*. *See Pierce*, 40 F.3d at 803-04. As discussed above, the employer's liability in cases of co-worker harassment is direct, not derivative; the employer is being held directly responsible for its own acts or omissions. *Pierce*, 40 F.3d at 804 n. 11. Thus, when an employer responds to charges of co-worker sexual harassment, the employer can be liable only if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known. The act of discrimination by the employer in such a case is not the harassment, but rather the inappropriate response to the charges of harassment. Upon the facts before the district court, the employer's good-faith response was entirely sufficient to escape liability under the *Rabidue* standard. *See also Spicer v. Commonwealth of Va. Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir. 1995) (*en ban*) (employer liable for co-worker sexual harassment "only if no adequate remedial action is taken."); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) (employer generally not liable unless "the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it."). There is a singular lack of evidence to refute the employer's claim that its actions were in good faith. Given the circumstances before it, there was little else, if anything it could do.

We recognize that our conclusion creates some tension with the first part of the *Rabidue* test, which asks whether the

employer "knew or should have known" of the charged harassment. That language establishes an objective standard as to the employer's awareness. In essence, it equates *negligent* ignorance of the existence of harassment with *intentional* discrimination. When *Rabidue* was written, we still viewed the employer's liability in co-worker harassment cases as arising under the respondeat superior doctrine, so the awkward equation of negligence with intent was not present: if the employer was negligent, it was held responsible for its employees' intentional discrimination, even if it had not itself intentionally discriminated. Now that we understand an employer's liability to be direct, however, the continued validity of the "knew or should have known" language in *Rabidue* relies on a sort of legal fiction: because harassment is an especially invidious form of discrimination, as to which employers should be particularly vigilant, negligence as to the existence of harassment can be serious enough to constitute an intentional act of discrimination.

Once an employer is aware of and responds to charges of sexual harassment, though, mere negligence as to the content of the response cannot be enough to make the employer liable. When an employer responds with good-faith remedial action, we cannot say that the employer has itself committed an act of discrimination. In sum, although negligence as to the existence of harassment may be enough under *Rabidue*, for an employer to incur liability for discrimination, negligence in the fashioning of a remedy is not. When an employer implements a remedy, it can be liable for sex discrimination in violation of Title VII only if that remedy exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination.

A. The October 4 and October 17 complaints

As to her two written complaints, Blankenship asserts that Parke should have taken more drastic action to separate her from Malcom. It should have confronted Malcom right away, she argues, and either transferred or terminated him. As Parke notes, though, a harassment victim may not dictate an employer's action against a co-worker. *See Bell*, 929 F.2d at 225. Parke argues that because of the lack of corroboration of the complaints, its actions in response to each were appropriate.

After the first complaint, Parke took several steps to protect Blankenship. Although hindsight shows that these measures may not have been sufficient, they were appropriate at the time and easily satisfy the "good faith" standard we have discussed above. *See Mullholand v. Harris Corp.*, No. 94-3725, 1995 WL 730466, at *3 (6th Cir. Dec. 8, 1995) ("Given that this was the first complaint . . . , it would hardly have been sensible to take serious action without investigation at this time."), *cert. denied*, 116 S. Ct. 1578 (1996). After the second complaint and the intervening breast-grabbing incident, Parke threatened Malcom with termination. This response was both prompt and appropriate. *See Fleenor*, 81 F.3d at 50-51; *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (finding that investigation into alleged harassment was "appropriate corrective action" and that employer was not required to fire harasser).

B. Blankenship's resignation

The most troubling facts of this case are those surrounding Blankenship's resignation. Blankenship argues that Parke unreasonably forced her to resign. Because she has not alleged wrongful termination or constructive discharge, this argument at first glance appears out of place. The events of October 22 can, however, be analyzed under *Rabidue*. Blankenship complained to Sullivan and to Kalota that day that

Malcom was "around" her and that she did not want to work in the same building with him. Parke's response was that Blankenship had either to accept the status quo or to resign. That response, as such, was prompt; we must decide whether it was appropriate under the good-faith standard. Plainly it was.

The only thing that Blankenship could complain about with respect to Malcom on October 22 was that he was "around" her. No misconduct was cited on that day and therefore there was nothing to merit further censure by Parke. The workplace involved here was relatively intimate in all events and Kalota could very well have concluded that it was at least difficult if not impossible to guarantee that the two could never escape an occasional contact. Perhaps Kalota could have handled the meeting with Blankenship and her mother more adroitly, but clearly the parties had reached an impasse. She had already implemented several steps in good faith to correct the problem; the confrontation on October 22, since it did not involve any untoward conduct on Malcom's part, could not occasion any further disciplinary action against Malcom himself.

While our holding can, we are satisfied, stand on its own, it is fortified by one other circumstance in this case which we believe could not realistically be ignored by Parke. Blankenship was female and white. Malcom was male and black. As supervisor, Parke was charged by Title VII with a duty not to discriminate against employees either on account of sex or on account of race. This duty would extend both to Blankenship and to Malcom. Not one of the actions alleged as harassment on Malcom's part was supported by an independent eyewitness. For his part, Malcom denied the acts charged. It is true that by the time of Blankenship's second complaint, co-employee Marshall had also claimed she was harassed by Malcom. Again, however, there was no independent eyewitness corroboration that we are aware of and Malcom denied these

charges also. Although we do not attempt to quantify this circumstance in a legal way, it would be unfair indeed to ignore the very practical dilemma which presented itself to Sullivan. The propriety of her conduct, her good faith, and her freedom from any intent to discriminate are manifest. Considering the facts of this case up to and including October 22, we find that Parke's response did not, as a matter of law, evidence the kind of discriminatory conduct on its part necessary to support the charge against it.

Parke was aware of Blankenship's complaints and had already implemented several steps in good faith to correct the problem. Preventing Malcom from coming near Blankenship was not yet a necessary step. If Malcom's harassment of Blankenship had further escalated, Parke might have been under a duty to prevent Malcom from being near Blankenship -- indeed, it might have been under a duty to fire him. *See Bell*, 929 F.2d at 224 ("[A]n appropriate corrective response will vary according to the frequency and severity of the alleged harassment."). Considering the facts of this case up to and including October 22, however, Parke's response, though perhaps subject to criticism for being obstinate, as a matter of law did not cross the initial threshold necessary to support a finding of discrimination.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

CONCURRENCE

Merritt, Circuit Judge, concurring. I concur in Judge Engel's opinion for the Court. In light of Judge Ryan's separate concurring opinion I should comment on my previous statement indicating that in coworker sexual harassment cases "direct negligence," as distinguished from "respondeat superior," is sufficient to establish employer liability. *See Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996). Having thought further about the matter, I do not believe that "negligence" is a very good shorthand label for liability in such cases. "Intentional" wrongdoing is probably not a very good label either.

Quoting from a previous Sixth Circuit case, I said in *Fleenor* that employer liability is established in coworker sexual harassment cases when "the employer knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate effective action." I think this should be the general standard, whatever label we put upon it -- negligence, recklessness, intentional, good faith, bad faith, and so on. Despite what I said in the *Fleenor* case, I do not think we should take our eye off the ball by insisting on a label drawn from the common law for this statutory tort which was unknown to the common law. The standard seems to me somewhere in between "negligence" and "intentional" wrongdoing. Perhaps we could call it "deliberate indifference" by the employer to the sexual harassment in its workplace if we must put a label or shorthand rhetorical characterization on the employer's conduct. Perhaps "deliberate indifference" catches the meaning of the standard better than older common law

concepts. Call it what you will, the standard quoted above is the one used in Judge Engel's opinion in paragraph 13.

This area of employer liability for coworker sexual advances is hard to get a good handle on, and I think Judge Engel's opinion does quite well in clarifying the problem and providing a reasonable standard.

CONCURRENCE

RYAN, Circuit Judge, concurring. Defendants Parke Care Centers, Inc. and Westchester Management Company responded promptly and appropriately--that is to say, reasonably--to plaintiff Leanna Blankenship's hostile work environment allegations and therefore cannot be liable for her injuries under Title VII. Thus, the result reached by the majority is correct. However, the analysis my brother employs in reaching this result misstates the law in several respects and therefore I must concur separately.

First, the majority opinion erroneously states that, in order for an employer to be liable for coemployee hostile work environment sex discrimination, the *employer* must discriminate on the basis of sex. It is simply not the law that an employer's liability for sex discrimination under Title VII requires proof that the employer himself, herself, or itself is guilty of sex discrimination. And, as I shall show, the decisional authority makes that abundantly clear.

Certainly, Title VII prohibits an "employer" from discriminating on the basis of sex. 42 U. S.C. § 2000e-2(a)(1). However, "employer" means "a person engaged in an industry affecting commerce . . . *and any agent of such a person* . . . ." 42 U.S.C. § 2000e(b) (emphasis added). Although in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), the Supreme Court declined to "issue a definitive rule on employer liability," the Court did reiterate that agency principles should provide guidance in this area. The *Meritor* Court then cited the Restatement (Second) of Agency §§ 219-237(1958) as a source for such guidance. *Id.*

Several courts have applied these agency principles, as directed by the Supreme Court, in coemployee cases. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535 (11th Cir. 1997); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987); *Lopez v. S. B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir. 1987). Courts have cited the Restatement (Second) of Agency § 219(2)(b) for the familiar proposition that a master may be subject to liability for the torts of his servant, even if the servant is acting outside the scope of his or her employment, if "the master was negligent or reckless." *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990); *Hicks*, 833 F.2d at 1418. Clearly, an employee is the employer's servant. *See* Restatement (Second) of Agency § 2(2). Agency principles, then, hold an employer directly liable for its negligence in failing to prevent or remedy the discrimination of its agent-employee.

This theory of employer liability has been ratified many times over. "[I]t is clear, the criterion for when an employer is liable for sexual harassment is negligence . . . ." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995) (emphasis added). In fact, this court has straightforwardly stated this principle on at least two occasions. *See Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 804 n. 11 (6th Cir. 1994). As Judge Merritt wrote for the court in *Fleenor*:

> Although we erroneously referred to it as "respondeat superior," we later realized that the term "respondeat superior" - which connotes derivative liability - is an incorrect label for co-worker harassment cases, where the employer is directly

> liable for its own *negligence*. This understanding, that the employer is directly not derivatively liable, and the underlying "knew or should have known" standard, are [sic] consistent with the law in other circuits. The standard is also consistent with the common law understanding of an employer's liability for the misconduct of employees.

Fleenor, 81 F.3d at 50 (emphasis added) (citations and some internal quotation marks omitted). Judge Merritt cited § 219(2)(b) of the Restatement as support for the above discussion. *Id.* at n.1. And so, contrary to statements in the majority opinion, there quite simply is no requirement of intentionality under Title VII for employer liability in hostile-work-environment sex-discrimination cases.

Second, my brother errs in implying that *respondeat superior* liability requires negligence on the part of the employer. Clearly, it does not. *See* W. Page Keeton, *et al.*, Prosser and Keeton on the Law of Torts § 69 (5th ed. 1988). Under *respondeat superior*, an employer is liable, despite having no fault whatsoever, for the acts of its employees which are within the scope of their employment. *Id.* This court eventually realized that, in the Title VII hostile-work-environment context, *respondeat superior* was a misnomer because 1) employer negligence is a prerequisite for liability, and 2) the creation of a hostile work environment is not generally within the scope of a coworker's employment. However, our realization that liability is direct, and not vicarious, did not change the substance of the law. An

employer was liable for its negligence when we were mistakenly using the term *respondeat superior*, and it continues to be liable for its negligence now that we do not use that misnomer. The "tension" the majority identifies is created only by its mistaken belief that direct liability under Title VII must be of the intentional variety, a belief undermined by the clear precedent demonstrating that negligence is sufficient.

Third, the majority has arbitrarily adopted a "good faith" standard for judging an employer's response to charges of sexual harassment, despite the absence of supporting case law and despite the fact that such a standard conflicts with the reasonableness analysis the majority recognizes must be applied in determining whether an employer should have known of the harassment. The majority cites no direct authority for a "good faith" standard and indeed I suggest there is none. In fact, the cases that come closest to defining the familiar "prompt and appropriate" formulation indicate that employers' remedial actions must be "reasonably likely to" or be "reasonably calculated to" end the harassment. *See Reynolds v. CSX Transp. Inc.*, 115 F.3d 860, 867 (11th Cir. 1997); *Knabe v. Boury Corp.*, 114 F.3d 407, 412 (3d Cir. 1997); *Zirpel v. Toshiba America Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997); *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983). While, arguably, "reasonably calculated to" may be construed as compatible with either subjective good faith *or* with an objective reasonableness standard, the latter is preferable. That is, there seems to be no good reason to establish inconsistent rules with which to evaluate, on one hand, whether the employer should have known of the discrimination and, on the other, the propriety of its response. Negligence, or objective reasonableness, should be the common standard in both inquiries. Not only does such an interpretation avoid

another "tension" of the kind my brother laments elsewhere in the majority opinion, but reasonableness is more easily ascertainable by a factfinder. In fact, those courts that have spoken unambiguously on this issue require an employer to provide a reasonable remedy. *Baskerville*, 50 F.3d at 432; *Lopez*, 831 F.2d at 1189.

Because, as a matter of law, defendants responded reasonably to plaintiff's allegations of sexual harassment by her coworker, defendants were entitled to summary judgment by the district court.

APPENDIX B

No. C-1-94-538

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

LEANNA C. BLANKENSHIP, *et al.*, *Plaintiffs,*	)	
v.	)	
PARKE CARE CENTERS, INC., *et al.*, *Defendants.*	)	**ORDER**

This matter is before the Court upon Defendants Parke Care Centers, Inc.'s ["Parke"] and Westchester Management Company's ("Westchester"] joint motions for summary judgment as to the claims of Plaintiff Blankenship (Doc. 20) and Plaintiff Marshall. (Doc. 21). Plaintiffs have filed a joint memorandum in opposition to those motions (Doc. 29), to which Defendants have filed separate replies. (Docs. 35, 36).

Also before the Court is Defendants Parke's and Westchester's motion to strike Plaintiffs' memorandum in opposition to their summary judgment motions. (Doc. 30).

Plaintiffs' memorandum in opposition to the motion to strike is styled alternatively as a motion to reconsider the Court's prior order denying a continuance, and as a motion to accept Plaintiffs' memorandum opposing Defendants' summary judgment motions. (Doc. 31). Both Defendants and Plaintiffs also have filed replies regarding that issue. (Docs. 34, 37). The Court therefore will consider all of these interrelated motions at this time.

Procedural History/The Parties' Claims

Plaintiffs Leanna Blankenship and Amy Marshall filed their original complaint against Parke Care Centers, Inc. and Walter Malcom on August 5, 1994. (Doc. 1). On September 26, 1994, they filed an amended complaint, adding Westchester Management Company as a Defendant. (Doc. 3). Each Plaintiff alleges that in the fall of 1993, she was a 17-year-old high school student employed as a dietary aide by Parke and/or Westchester. Both allege that during their employment, Defendant Malcom, a custodian in his forties also employed by Parke and/or Westchester, subjected them to unwelcome and sexually suggestive comments, gestures and contact. Plaintiffs contend that Defendant Malcom's conduct forced both of them to leave their employment. Although Plaintiffs concede that they suffered no loss of income, they seek damages from all Defendants based upon claims of sexual harassment under federal and state law, as well as state law claims of intentional infliction of emotional distress and assault and battery.

On July 31, 1995, Defendants Parke and Westchester filed their joint motions for summary judgment as to both Plaintiffs' claims. (Docs. 20, 21). Defendant Parke contends that it was not Plaintiffs' employer for purposes of 42 U.S.C. § 2000e liability. Moreover, both of these Defendants argue that they cannot be held liable to Plaintiffs for sexual harassment

based upon any unwelcome advances made by Defendant Malcom, as Defendant Malcom's conduct was not sufficiently severe or pervasive to create a hostile working environment; as Plaintiff Marshall never made them aware of any problems; and as they promptly investigated and responded appropriately to Plaintiff Blankenship's complaints.

Defendants Parke and Westchester further urge that Plaintiffs' other state law claims must fail, as these Defendants never intended to cause Plaintiffs emotional distress and never assaulted or battered either Plaintiff, nor are they vicariously liable for Defendant Malcom's conduct. In the alternative, Defendants ask the Court to decline to exercise supplemental jurisdiction over Plaintiffs' state law claims.

On August 21, 1995 -- the date that their response to Defendants' summary judgment motion was due under the applicable procedural rules -- Plaintiffs filed a motion to continue summary judgment proceedings, citing a need to complete discovery. (Doc. 24). Defendants opposed Plaintiff's request for additional time. (Doc. 25). On September 19, 1995, the Court denied Plaintiffs' continuance request, noting that the discovery deadline in this matter had passed on August 1, 1995. (Doc. 27).

On September 29, 1995, Plaintiffs filed a memorandum in opposition to Defendants' summary judgment motions. (Doc. 30). On October 2, 1995, Defendants moved to strike Plaintiffs' opposing memorandum, both as untimely and for failure to comply with Local Rule 7.2 (a) (3) 's restrictions regarding length of memoranda. (Doc. 30).

On October 3, 1995, Plaintiffs filed a memorandum in opposition to Defendants' motion to strike. (Doc. 31). Incorporated into that memorandum, Plaintiffs also moved the

Court for reconsideration of its prior order denying continuance of summary judgment proceedings, and for permission to file their memorandum opposing summary judgment out of time.

OPINION

I. Motion to Strike Memorandum Opposing Summary Judgment

A. Untimeliness

In accordance with Local Rule 7.2(a)(2), a memorandum in opposition to any motion is to be filed and served within 21 days after the motion was served. Three additional days are permitted for responding to motions served by mail. Id.; see also Fed. R. Civ. P. 6(e).

Applying those rules to this matter, Plaintiffs' memorandum in opposition to Defendants' summary judgment motions was filed some 38 days out of time. The certificates of service attached to Defendants' motions for summary judgment indicate that such motions were hand delivered to Plaintiffs' counsel on July 31, 1995. (See Docs. 20, 21). Notwithstanding the fact that any memorandum in opposition to those motions therefore was due no later than August 21, 1995, Plaintiffs waited until that date to seek a delay of the summary judgment proceedings, contending that additional discovery was needed in order to prepare an adequate response. (See Doc. 24). Ten days after the Court rejected Plaintiffs' plea for additional discovery time (Doc. 27), Plaintiffs filed the 54 page memorandum opposing summary judgment (Doc. 29) that Defendants now seek to strike.

Courts ordinarily prefer to decide motions only after duly considering the position advanced by each party. Indeed,

in discussing the time limits for opposing any motion, the local rules provide that a court may grant a motion based upon the adverse party's failure to oppose it, only if granting the subject motion would not "result directly in entry of final judgment or an award of attorney fees." Local Rule 7.2(a)(2). Nevertheless, the Court is not precluded from deciding even a dispositive motion without considering input from a party who was afforded an opportunity, but failed, to timely apprise the Court of its arguments.

In this matter, Plaintiffs' failure to file a timely memorandum in opposition to Defendants' summary judgment motions can be attributed only to Plaintiffs' own neglect in not completing discovery within the prescribed time period, and/or in not seeking the Court's intervention before Plaintiffs' designated time to respond had lapsed. As a practical matter, however, the Court had not begun to consider Defendants' summary judgment motions before Plaintiffs filed their opposing memorandum, and Plaintiffs' untimely filing thus did not delay resolution of those motions. Defendants have not asserted, nor does it appear that they could articulate, any prejudice stemming from Plaintiffs' untimely filing. (See Doc. 25). Given the Court's reluctance to decide a dispositive motion without considering input from all affected parties, the Court is not inclined to strike an untimely filing that resulted in no delay in the proceedings.

B. Failure to Conform to Local Rule 7.2(a)(3)

Any memorandum in opposition to a motion filed in this Court "should not exceed twenty (20) pages, " and "must include an abbreviated introductory summary of all points raised and of the primary authorities relied upon in the memorandum" if it does exceed that page limit. Local Rule 7.2(a)(3) (emphasis added).

Defendants argue that Plaintiffs' untimely memorandum opposing summary judgment also should be stricken because its 54 pages exceed the length permitted by the foregoing local rule. (See Doc. 29). As Plaintiffs correctly note, however, their opposing memorandum does include a section entitled "Summary of Points and Authorities," in an apparent effort to comply with Local Rule 7.2(a)(3)'s provisions. (See Doc. 29, pp. i-iv). Although that "Summary," which amounts to no more than a cursory outline, is not necessarily in the form contemplated by this Court, the "Summary" nonetheless appears to conform to the unelaborated-upon letter of the local rules. Accordingly, the Court will not strike Plaintiffs' opposing memorandum for failure to conform to the rules.

II. Motion to Reconsider Continuance Request and/or to Accept Untimely Memorandum

When Plaintiffs first moved to continue the summary judgment proceedings in order to allow additional discovery, the Court was unmoved by Plaintiffs' plea, given that the discovery deadline already had lapsed. In light of the Court's further conclusion herein that Plaintiffs' own neglect occasioned any need for post-deadline discovery, the Court is unwilling to reconsider its prior order denying a continuance of summary judgment.

Notwithstanding that unwillingness, the Court already has determined that better practice would counsel against striking Plaintiffs' memorandum in opposition to Defendants' potentially dispositive summary judgment motions.

Accordingly, Plaintiffs' motion to accept their untimely opposing memorandum is granted.[1]

III. Motions for Summary Judgment

A. Standard of Review Applicable to Summary Judgment Motions

The summary judgment procedure under Fed. R. Civ. P. 56 is designed to secure a just, speedy and inexpensive determination of any action. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). However, Rule 56(c) permits the Court to grant summary judgment as a matter of law only after the moving party has identified as the basis of its motion "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which demonstrate the absence of any genuine issue of material fact. Id. at 323.

The party opposing a properly supported motion for summary judgment "may not rest upon mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986) (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253 (1968)). The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 (1970)).

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[1] Plaintiffs should not construe the broad latitude extended under these particular circumstances as a license to disregard further filing deadlines. The parties hereby are admonished that any and all deadlines henceforth will be ignored at the parties' peril.

The function of the court is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Anderson at 249 (citing Cities Serv., 391 U.S. at 288-89). If the evidence is merely colorable, Dombrowski v. Eastland, 387 U.S. 82, 84 (1967), or is not significantly probative, Cities Serv., 391 U.S. at 290, judgment may be granted. Anderson, 477 U.S. at 249.

B. Elements of Ohio and Federal Sexual Harassment Claims

State law claims for sexual harassment brought under Ohio Rev. Code § 4112 are subject to the same standards applicable to federal harassment claims brought under Title VII. See Ohio Civil Rights Comm'n v. Ingram, 69 Ohio St. 3d 89, 92 (1994); Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992). Courts have construed Title VII's prohibition against discrimination on the basis of sex to apply to two types of sexual harassment: 1) quid pro quo harassment, in which a supervisor demands sexual favors in exchange for job benefits; and 2) harassment that creates an offensive or hostile work environment. See 42 U.S.C. § 2000e-2(a)(1); Rabidue v. Osceola Refining Co., 805 F.2d 611, 618 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). In order to prevail in any hostile environment action, a plaintiff must assert and prove: 1) that she is a member of a protected class; 2) that she was subjected to unwelcome sexual harassment (i.e., sexual advances or other verbal or physical conduct of a sexual nature); 3) that the harassing conduct was directed toward her because of her sex; and 4) that the harassment unreasonably interfered with her work performance and created an intimidating, hostile or offensive working environment. Id. at 619-20; see also

Kauffman v. Allied Signal, Inc., 970 F.2d 178, 183 (1992), cert. denied, _ U.S. _ , 113 S.Ct. 831 (1992).

As to allegations of harassment perpetrated by a co-worker, a plaintiff also must establish the existence of respondeat superior liability. Rabidue, 805 F.2d at 619-20, 621. The plaintiff thus must show that the employer knew or should have known of, but failed to take appropriate action to correct, the co-worker's harassing conduct. Kauffman, 970 F.2d at 183. The Ohio Supreme Court has adopted a similar approach. See Kerans v. Porter Paint Co., 61 Ohio St. 3d 486 (1991). The finder of fact should evaluate "[t]he promptness and adequacy of the employer's response . . . on a case by case basis." Rabidue, 805 F. 2d at 621. See also Kerans, 61 Ohio St. 3d at 492 ("The appropriate response . . . will depend on the facts of the particular case, including the frequency and severity of the employee's actions."). Summary judgment may be granted if the plaintiff fails to prove that the employer knew or should have known of a co-worker's harassing conduct. See Faris v. Henry Vogt Machine Co., 813 F.2d 786 (6th Cir. 1987). But see Kerans, 61 Ohio St. 3d at 486 (summary judgment not appropriate if evidence suggests that employer knew or should have known of employee's past history of harassment).

Whether particular conduct sufficed to create a hostile environment is subject to both an objective and a subjective test. For purposes of the objective test,

> the trier of fact, when judging the totality of the circumstances impacting upon the asserted abusive and hostile environment . . . must adopt the perspective of a reasonable person's reaction to a similar environment under

> essentially like or similar circumstances. [Absent] conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously [her] psychological well-being . . . a plaintiff may not prevail on . . . [hostile environment] sexual harassment . . . regardless of whether [she] was actually offended by the defendant's conduct.

Rabidue, 805 F. 2d at 620. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview." Harris v. Forklift Systems, Inc., U.S. _, 114 S.Ct. 367, 370 (1993). Conduct that simply "engenders offensive feelings" thus does not sufficiently affect conditions of employment to implicate Title VII. Id.

For purposes of the subjective test, a plaintiff who has succeeded in showing that a hypothetical reasonable person would find her work environment to be hostile also must demonstrate that she personally "was actually offended" by the conduct at issue, and that she "suffered some degree of injury." Rabidue, 805 F.2d at 620. Factors to be considered in making both the objective and subjective evaluations include the nature of the alleged harassment, the alleged victim's background and experience, the atmosphere of the workplace and the plaintiff's reasonable expectations regarding the workplace. Id. A court should examine the frequency and the severity of the conduct, whether it is physically threatening, humiliating or merely

offensive, and whether it unreasonably interferes with the plaintiff's work performance. Harris, 114 S.Ct. at 371. "[T]he presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment and must be considered upon an ad hoc basis." Rabidue, 805 F.2d at 620.

Given the fact-specific nature of the inquiry into the merits of hostile environment sexual harassment claims, some courts have evinced a reluctance to grant summary judgment thereon. See, e.g., Mann v. University of Cincinnati, 864 F. Supp. 44, 46 (S.D. Ohio 1994) (Spiegel, J.); Beardsley v. Webb, 30 F.3d 524, 530 (4th Cir. 1994). Nevertheless, the issue of whether specific conduct rises to a level sufficient to constitute hostile environment sexual harassment is a legal question that may be appropriate for disposition on summary judgment. See, e.g., Goldsmith v. City of Canton, 47 F.3d 1168 (unpub.), 1995 U.S. App. LEXIS 12986 (6th Cir. Feb. 14, 1995); Gebers v. Commercial Data Ctr., Inc., 47 F.3d 1168 (unpub.), 1995 U.S. App. LEXIS 614 (6th Cir. Jan. 10, 1995); Saxton v. American Tel. & Tel., 10 F.3d 526 (7th Cir. 1993); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333 (7th Cir. 1993); Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986).

C. Elements of Intentional Infliction of Emotional Distress Claim

To prevail on a claim for intentional infliction of emotional distress under Ohio law, a plaintiff must prove that the defendant's conduct was outrageous and caused the plaintiff to suffer severe emotional distress. Yeager v. Local Union 20, 6 Ohio St. 3d 369, 374-75 (1983). "Outrageous" conduct is defined as being so extreme as to exceed "all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. at 375. The defendant

additionally must have intended to cause, or have acted with reckless disregard to the likelihood of causing, the emotional distress suffered by the plaintiff. Brandenburger v. Hilti, Inc., 52 Ohio App. 3d 21, 29 (1989).

D. Elements of Assault and Battery Claim

To prove assault and battery under Ohio law, a plaintiff must establish that the defendant unlawfully touched him or her with the intent of inflicting injury or of at least creating fear of injury. 6 Ohio Jur. 3d, Assault § 4 (1978). To constitute battery, the contact complained of must be harmful or offensive. Snyder v. Turk, 90 Ohio App. 3d 18, 24-25 (1993). Although the element of intent to inflict injury may be inferred from conduct which is wantonly or grossly negligence, conduct which is merely negligent will not alone suffice to sustain an action for assault and battery. 6 Ohio Jur. 3d, Assault § 5; see also Brewing Co. v. Archer, 42 Ohio St. 213, 214 (1984).

E. Elements of Respondeat Superior Liability of Employer

Under Ohio law, an employer ordinarily can be held liable for an intentional tort committed by an employee only if the employee's actions were "calculated to facilitate or promote the business for which [he] was employed." Byrd v. Faber, 57 Ohio St. 3d 56, 58 (1991). An employer thus could not be held liable for "independent self-serving acts of [its] employees which in no way facilitate or promote [its] business." Id. at 59. See also Taylor v. Doctors. Hosp., 21 Ohio App. 3d 154 (1985) (hospital not liable for orderly's sexual assault upon a patient); Bunce v. Parkside Lodge, 73 Ohio App. 3d 253 (1991) (rehabilitation facility not liable for counselor's sexual assault upon a patient). But see Davis v.. Black, 70 Ohio App. 3d 359, 366 (1991) (reversing summary judgment for church as to its

vicarious liability for workplace sexual harassment of church employee by parish priest). The issue of whether particular conduct occurred within the scope of an employee's employment can be decided as a matter of law if reasonable minds could reach only one conclusion. Osborne v. Lyles, 63 Ohio St. 3d 326, 330 (1991).

More recent Ohio decisions have deviated somewhat from the traditional view, however, finding that an employer may be liable even for conduct outside of an employee's scope of employment, if the employer knew that the employee posed a risk of harm to others, but failed to take appropriate corrective measures. See Kerans, 61 Ohio St. 3d 486 (in the context of sexual harassment only); Potter v. City of Troy, 78 Ohio App. 3d 372 (1992) (extending "safe workplace" theory to intentional infliction of emotional distress). The test articulated in Potter for holding an employer liable for intentional infliction of emotional distress is "whether an employer has acted despite a known threat that harm to an employee is **substantially certain** to occur." Id. at 381 (emphasis added) (quoting Kunkler v. Goodyear Tire & Rubber Co., 36 Ohio St. 3d 135, 139 (1988)).

Under either approach, however, the burden of proving that tortious conduct of an employee should be attributed to his employer presumably falls to the plaintiff. See, e.g., Miller v. Reed, 27 Ohio App. 3d 70, 73 (1986).

F. Analysis of Employer's Sexual Harassment Liability for Defendant Malcom's Actions

In apparent deference to an employer's inability to address conduct of which it was unaware, cases regarding hostile work environment sexual harassment consistently have imposed liability upon employers only if they knew or should

have known of the harassment, yet failed to take appropriate corrective action. See Rabidue, 805 F.2d at 619-20, 621; Faris, 813 F.2d at 787 (affirming summary judgment for employer where "the evidence disclosed that the employer had implemented measures to remedy any possible confrontation between plaintiff and her co-workers."). The Court therefore must examine Defendants' level of knowledge and responsiveness regarding Malcom's alleged harassment.

1) Plaintiff Marshall

Plaintiff Marshall alleges that from October 11, 1993 to October 16, 1993, Defendant Malcom blew kisses, licked his lips, and smiled at her seductively or perversely on several occasions; made obscene gestures toward his crotch on one occasion; touched his finger against her chest above her breast on one occasion; and made vulgar sexual remarks in her presence about another female co-worker on one occasion. (Doc. 29, pp. 18-19).

It is undisputed, however, that Plaintiff Marshall failed to advise any supervisory personnel of any alleged harassment by Defendant Malcom during the five or six days that she actively worked for Defendants Parke and/or Westchester. Indeed, according to her own opposing memorandum, Marshall complained to her employer about Malcom only after her supervisor sought her out when she failed to report for work, and her supervisor then solicited a written complaint. (See Doc. 29, pp. 19-20). Despite her supervisor's assurances that the problem would addressed, Marshall refused to return unless Malcom was removed from the workplace. (See Doc. 29, p. 20).

While a victim of sexual harassment is entitled to a "prompt[] and adequa[te] response" from her employer,

Rabidue, 805 F.2d at 621, nothing in the case law suggests that victims are entitled to dictate the nature of the employer's corrective action. In this instance, Marshall denied her employer the opportunity to try to address the perceived problem (consisting of leers, gestures and comments of a sexual nature, plus one incident of unwelcome touching) through any measure short of transferring Malcom or terminating his employment.

Plaintiff Marshall has presented no evidence that prior to her complaint, her employer had reason to be aware of **any** problem with Malcom other than through Plaintiff Blankenship's then-recent and uncorroborated complaint, nor has she presented evidence that the employer previously had any reason to suspect that Malcom's behavior as alleged by Blankenship might also extend to Marshall. Marshall -- a short-term employee of less than one week -- nonetheless seeks compensation because her employer declined to accede immediately upon receiving her complaint to Marshall's demand that Malcom -- presumably a much longer term employee -- be fired or moved.

Apparently seeking to imply that the corrective action implemented as to Malcom (i.e., observing him for improper conduct, then warning him) was inadequate, Marshall has set forth evidence suggesting that Malcom subsequently harassed other female employees of Defendants Parke and/or Westchester. (See Doc. 29, pp. 25-28). Plaintiffs apparently would have the Court evaluate their employer's actions in October of 1993 in light of Malcom's later conduct through February of 1994. Unfortunately, Plaintiffs' employer lacked the benefit of hindsight in making its earlier decisions, and thus should not be charged with the same level of knowledge now available to Plaintiffs and the Court.

The fact that the employer's first approach ultimately proved to be ineffective to prevent further harassment is not determinative as to whether that initial approach was appropriate under the circumstances.[2] Marshall concedes that upon receiving Blankenship's second complaint and Marshall's similar complaint on October 18, supervisory personnel questioned Malcom and immediately issued a written warning threatening him with termination. (Doc. 29, p. 21). Marshall has presented no evidence tending to show that Defendants Parke and/or Westchester should have known at that time that the threat of termination would prove futile. Indeed, Marshall's implication that the employer was somehow culpable for failing to question Malcom sooner (see Doc. 29, p. 13) is undercut by her own concession that when confronted, "Malcom, **as expected**, denied having harassed anyone." (Doc. 29, p. 21) (emphasis added). Neither the record nor logic would support an inference that an earlier confrontation would have yielded a different result.

Reprehensible as the conduct that Marshall attributes to Malcom may be, such conduct is not likewise attributable to her employer, based upon the evidence before this Court. Rather, the undisputed evidence suggests that upon first receiving recent-hire Blankenship's isolated complaint against a longer-tenured fellow employee, and despite their inability to locate any

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[2] Plaintiffs propose that the lack of success of an employer's efforts is dispositive of whether such efforts were appropriate. However, they have cited no decisions binding upon this Court to support that proposition. (See Doc. 29, p. 39). The employer's actions herein were not inconsistent with the cited language from Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987), requiring only that an employer take remedial action, "or at a minimum, inquire," when first apprised of an employee's harassment. Moreover, given Rabidue's unambiguous use of the word "appropriate" rather than "effective" with reference to the corrective action required of employers, the Court is unwilling to graft a requirement of success onto the Rabidue standard.

witnesses to the alleged harassment, Defendants Parke and/or Westchester took reasonable measures to separate Malcom from the only person he was known to have allegedly harassed, and to closely monitor the situation. When Blankenship levelled a second harassment charge against Malcom, Plaintiffs' employer solicited a corroborating complaint from Marshall, procured Malcom's "expected" denial, and nonetheless warned him that future harassment would result in his dismissal.

This Court cannot conclude that such corrective actions were not an adequate, and indeed appropriate, response as to Plaintiff Marshall, under the circumstances then known to her employer. In light of the level of their knowledge and the appropriateness of their response, and contrary to Plaintiffs' arguments, Defendants Parke and/or Westchester cannot be said to have failed to provide Plaintiffs with a safe workplace. See Kerans, 61 Ohio St. 3d 486.

2) Plaintiff Blankenship

Plaintiff Blankenship's allegations show that between September 13, 1993 and October 3, 1993, Defendant Malcom suggested once that he was "falling in love" with Blankenship, tickled her on another occasion, and hugged and/or kissed her on the cheek on four occasions. She took no measures to make her employer aware of any problem, however, until October 4, 1993, when she complained to her immediate supervisor about the aforesaid incidents. The facility's administrator responded to Blankenship's uncorroborated complaint by assigning Defendant Malcom to a different area within the building where Blankenship worked, by directing Malcom's supervisor to monitor Malcom's whereabouts, and by directing Blankenship's supervisor to communicate regularly with Blankenship, to stay apprised of any further problems.

Despite the employer's initial response to the problem, Malcom's harassing conduct toward Blankenship thereafter continued. On one occasion, Malcom approached Blankenship from behind and lifted her breasts; on another occasion, he repeatedly asked her for a date. Blankenship reported the touching incident to her supervisor. Although the supervisor pledged to seek further precautions, she thereafter refused to tell Blankenship's mother what action would be taken. Five days later, on October 22, 1993, when Malcom continued to appear in her work area, Blankenship called her mother and asked her to take Blankenship home. When Blankenship's mother appeared and pushed for a resolution of the problem, the facility's administrator asked Blankenship to resign.

The facts underlying Plaintiff Blankenship's cause of action against her employer initially impress the Court as significantly more compelling than Plaintiff Marshall's situation. Unlike Marshall, Blankenship unilaterally initiated a complaint against Malcom, continued to work after making that complaint, and continued to be harassed by Malcom even after making her employer aware that a problem existed. Notwithstanding those additional facts, however, the Court still cannot conclude that Defendants Parke and/or Westchester bear vicarious responsibility for any injury that Blankenship suffered.

The evidence before this Court indicates that until the day that Marshall came forward at her supervisor's urging, the employer's only notice of Malcom's ostensible propensities was Blankenship's uncorroborated charge of certain improper conduct directed toward her individually. Confronted with the difficult dilemma of addressing a relatively new employee's harassment allegation against a more seasoned employee with no documented record of such conduct, the employer adopted an approach that must be deemed reasonable under the circumstances -- after seeking but finding no witnesses to the

harassment, the employer endeavored to segregate the two individuals involved, and to monitor the situation closely.

Subsequently, upon actively soliciting and receiving another employee's complaint that tended to corroborate Blankenship's allegations, the employer immediately warned Malcom that he would be dismissed for any future harassment, then maintained its policy of trying to isolate Blankenship from contact with Malcom, though with limited success.

Although the employer's approach ultimately proved to be unsuccessful at curbing Malcom's harassment, such response was not so inadequate or inappropriate as to render the employer liable to Blankenship. Under the applicable test, it cannot be said that Defendants Parke and/or Westchester "knew or should have known" of the harassment, but "failed to implement prompt and **appropriate** corrective action." Rabidue, 805 F.2d at 621 (emphasis added). The Court concludes that Blankenship's employer's actions were both prompt and appropriate, under the circumstances that then existed.

G. Analysis of Hostile Environment Allegations

Having already determined that neither Plaintiff can sustain her burden of proving respondeat superior liability on the part of her employer, the Court need not address Defendants Parke's and Westchester's additional contention that Plaintiffs' allegations are insufficient to sustain an actionable claim for hostile environment sexual harassment. The Court nonetheless observes that although the facts herein weigh in

favor of concluding that these particular Plaintiffs[3] subjectively would perceive the alleged conduct to affect the conditions of their employment, the likely reaction of a hypothetical reasonable person is less clear.

As Defendants argue, some decisions have held that comparable conduct was insufficient to rise to the level of hostile environment sexual harassment. See, e.g., Saxton, 10 F.3d 526; Weiss, 990 F.2d 333; Scott, 798 F.2d 210. As before, the Court's impression is that while Plaintiff Blankenship presents a stronger case than does Plaintiff Marshall, neither Plaintiff's contentions definitively meet the applicable legal standard. Accordingly, the nature of the conduct itself conceivably could provide an alternative basis for granting Defendants' motions.

H. Analysis of Intentional Infliction of Emotional Distress and Assault and Battery Claims

The facts in this action simply do not support a conclusion that Defendants Parke and/or Westchester are primarily liable to either Plaintiff for intentional infliction of emotional distress. Nothing that such Defendants did or failed to do could be deemed "outrageous" in accordance with the applicable legal standard. See Yeager, 6 Ohio St. 3d 369. Similarly, having done nothing themselves that could constitute

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[3] In addition to being only 17 years of age at the time of the incidents in question, both Plaintiffs purportedly had been victims of sexual abuse in the past. (See Doc. 29, pp. 29, 32). The Court believes that Plaintiffs' youth, their relative inexperience in dealing with issues in any workplace environment, and their history of sexual victimization are all relevant factors to be considered in gauging their likely subjective reaction to the sexually-charged conduct of an over-40 male co-worker.

an assault and battery, Defendants Parke and Westchester could be liable to Plaintiffs for such a claim only under a respondeat superior theory of liability.

As Plaintiffs have presented no evidence suggesting either how Malcom's behavior fell within the scope of his employment as a custodian, see Byrd, 57 Ohio St. 3d 58, or that Malcom's employer previously had reason to know that Malcom's continued presence at the site was "substantially certain" to cause harm to Plaintiffs, see Potter, 78 Ohio App. 3d at 381, Defendants Parke and/or Westchester also are not liable under a respondeat superior theory for either assault and battery or intentional infliction of emotional distress. See Miller, 27 Ohio App. 3d at 73.

IV. Defendant Parke's Motion to Dismiss As Non-Employer

Given the Court's conclusion that both Defendant Parke and Defendant Westchester would be entitled to summary judgment as to all of Plaintiffs' claims, the Court need not address the additional argument that Defendant Parke should be dismissed due to its lack of a sufficient number of employees to invoke Title VII and Ohio Rev. Code § 4112.01 jurisdiction.

IT THEREFORE IS ORDERED that Defendants Parke Care Centers, Inc.'s and Westchester Management Company's motion to strike Plaintiffs' memorandum in opposition to summary judgment (Doc. 30) hereby is DENIED; that Plaintiffs' motion to reconsider order denying continuance (Doc. 31) hereby is DENIED; and that Plaintiffs' motion to accept and consider Plaintiffs' memorandum in opposition to summary judgment (Doc. 31) hereby is GRANTED.

IT FURTHER IS ORDERED that Defendants Parke's and Westchester's motions for summary judgment as to the claims of Plaintiff Blankenship (Doc. 20) and Plaintiff Marshall (Doc. 21) hereby are GRANTED. Accordingly, the Clerk of Courts is directed to enter summary judgment in favor of Defendants Parke and Westchester as to all claims of both Plaintiffs.

IT IS SO ORDERED.

S/Sandra S. Beckwith
Sandra S. Beckwith, Judge
United States District Court

APPENDIX C

42 U.S.C.S. Section 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Supreme Court, U.S.
FILED
DEC 31 1997
CLERK

No. 97-906

(2)

In The

Supreme Court of the United States

October Term, 1997

LEANNA C. BLANKENSHIP,

Petitioner,

vs.

PARKE CARE CENTERS, INC., and WESTCHESTER MANAGEMENT COMPANY, doing business as BARBARA PARKE CONVALESCENT CENTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether the lower courts properly applied the well-established requirement of "prompt and appropriate corrective action" to the particular facts of this case.

PARTIES TO THE PROCEEDING

Respondent Westchester Management Company is a wholly owned subsidiary of respondent Parke Care Centers, Inc. Parke Care Centers, Inc. has three other wholly owned subsidiaries: Parke Care of Silverton, Parke Care of Westwood, and Parke Care of Finneytown. The entire group is privately held. Neither respondent has any other parent companies or nonwholly owned subsidiaries.

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This case does not implicate any circuit split. Indeed, the petitioner herself concedes that federal courts of appeal have been "almost unanimous" on the question that she addresses. Pet. 11. Although the petitioner claims that the decision under review disrupts this unanimity, she reaches this conclusion only by misinterpreting the opinions below. The respondents respectfully submit that her petition should be denied.

OPINIONS BELOW

The District Court's opinion is reported at 913 F. Supp. 1045 (S.D. Ohio 1996). The Sixth Circuit's opinion is reported at 123 F.3d 868 (6th Cir. 1997).

COUNTERSTATEMENT OF THE CASE

Respondent Westchester Management Company, a wholly owned subsidiary of respondent Parke Care Centers, Inc., operates the Barbara Parke Nursing Home in Middletown, Ohio. On September 13, 1993, petitioner Leanna Blankenship started work at the nursing home as a student dietary aide. Pet. App. A3. At her orientation session, Alice Kalota — the administrator in charge of the nursing home — reviewed with Blankenship the nursing home's handbook, which includes the nursing home's prohibition against sexual harassment. *See* Sixth Cir. Joint Appendix ("C.A. App.") 356-57, 501-02.

On Sunday, October 3, 1993, Blankenship complained to her supervisor, Jacquelyn Sullivan, that a janitor named Walter Malcom had "c[o]me up and hugged me and kissed me twice." *Id.* at 303. Sullivan immediately called Lisa Morgan, the charge nurse responsible for the facility over the weekend. *Id.* at 549-50, 555-57. Morgan told Sullivan to ask Blankenship to put her allegations in writing. *Id.* at 557. Sullivan also called Malcom's supervisor, Mamie Lee, on that same day, which was Lee's day off. *Id.* at 456-57. Lee came to the nursing home and monitored

Malcom's work that day; although Lee did not observe any inappropriate behavior, she immediately moved Malcom's work station to the lower level of the nursing home in order to minimize his contact with Blankenship. *Id.* at 460-67. Similarly, Sullivan moved Blankenship into the kitchen to minimize her contact with Malcom and to help Sullivan keep a protective eye on her. *See id.* at 557, 387. Sullivan also escorted Blankenship to her car after work in order to protect her. *See id.* at 312.

The following day, October 4, Blankenship gave Sullivan the requested written statement. In contrast to the oral statement that Blankenship had given Sullivan the day before, the written statement alleged that Malcom had hugged Blankenship and kissed her on the cheek on three separate occasions; that Malcom had tried to tickle her on another occasion; and that on another occasion Malcom had kissed her on the cheek and had suggested that he was falling in love with her. *Id.* at 346-47.

Management of the nursing home believed that it could not properly or fairly discipline Malcom based solely upon Blankenship's uncorroborated account.[1] Instead, management used interviews and surveillance to investigate the situation. Sullivan interviewed all members of the dietary staff who might have witnessed the alleged misconduct, but none of them could confirm Blankenship's allegation. *See id.* at 554-59. Judith Fadden, the director of nursing, instructed Sullivan to keep a close eye on Blankenship, *id.* at 561, while Lee came into the nursing home at odd hours on various days to observe Malcom. *Id.* at 387. Sullivan told Blankenship that an investigation was under way and that the problem would be addressed. *Id.* at 561. Blankenship appeared to be comforted by this response. *Id.* at 562.

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1. Had the nursing home disciplined or discharged Malcom without further evidence, it could well have been inviting a race-discrimination claim from Malcom, who was African-American. Pet. App. A38, A12.

Lee, Sullivan, Kalota, Fadden, and the charge nurses all were informed of Blankenship's allegations. In an effort to confirm those allegations, they began a surveillance network to watch both Malcom and Blankenship. *See id.* at 413-14. In addition, each day that Blankenship and Sullivan worked after the initial complaint, Sullivan asked Blankenship whether Malcom was causing any trouble. *Id.* at 312, 563. According to Sullivan, Blankenship reported no problems with Malcom from October 4 until October 17. *Id.* at 563.[2]

Blankenship did not work from October 13 through October 16. On Sunday, October 17, she submitted a second written complaint to Sullivan asserting that on October 12, Malcom had asked her out for a date. Blankenship's note stated: "I'm afraid because of what happened before and I'm afraid that he will keep on touching me and bothering me like he did before." *Id.* at 348. Sullivan promptly gave the note to her supervisor, Director of Nursing Fadden. *Id.* at 564-65. On October 18, a former employee named Amy Marshall complained that Malcom

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2. Blankenship indicates that some time around October 10 or 11, Malcom came up behind her and grabbed her breasts. Pet. 3. Blankenship also claims that she reported this incident to Sullivan. *Id.* In her first deposition, Blankenship testified that she could not remember when this alleged incident occurred. *See* C.A. App. 316. After conferring with counsel, Blankenship placed it after the October 4 written statement. *Id.* at 318. In the course of reviewing the deposition transcript, however, Blankenship changed her answer to place the incident on October 2 — two days *before* the written statement, which makes no mention of the incident. *Id.* at 350. In her second deposition, Blankenship retracted this correction and testified that the alleged incident occurred some time between October 5 and October 17. *Id.* at 362-65. But the written statement that Blankenship submitted on October 17 also makes no mention of the incident. In sum, Blankenship has placed this single alleged incident at three separate times, and she failed to include it in any of her written reports. The nursing home denies that the incident occurred at all or that Blankenship reported it to Sullivan.

had paid inappropriate attention to her. *Id.* at 521-22. That same day, October 18, Fadden and Kalota interviewed Malcom. *Id.* at 376-77. Malcom denied that he had done any of the things of which he had been accused, and he specifically denied harassing Blankenship or Marshall. *Id.* at 377, 419-20. Nevertheless, the nursing home issued Malcom a written disciplinary warning stating that "[h]arassment of any kind by an employee to another employee absolutely will not be tolerated." The disciplinary warning added that "[a]ny further occurrence will result in your immediate termination." *Id.* at 406. By giving Malcom this warning, the nursing home was imposing "level 2" of its "four levels of disciplinary action." *Id.* at 501.

It is undisputed that following this disciplinary warning, Blankenship never reported another sexual word or act by Malcom. Indeed, Sullivan questioned Blankenship each working day after October 17 to make sure that Blankenship was not being harassed, and Blankenship reported no further problems. *Id.* at 312, 331, 575. But on October 22, Blankenship became upset at work because Malcom was "around" her. Pet. App. A5. Although Blankenship did not report that Malcom was doing anything of an inappropriate nature, Sullivan gave Blankenship permission to leave early, and Blankenship's mother came to pick her up. *Id.* When she arrived, Blankenship's mother complained loudly about Malcom to administrator Kalota within earshot of the aged and infirm residents of the nursing home. C.A. App. 429-30. Kalota, Fadden, and Sullivan then met with Blankenship. Pet. App. A5. Blankenship said that Malcom had done nothing improper to her since October 12, when he had allegedly asked her for a date. Pet. App. A5. Blankenship mentioned only that Malcom was "around" her and that she did not want to be near him. Kalota told Blankenship that she could not guarantee that Blankenship could work without ever seeing Malcom. *Id.* Blankenship then chose to resign. *Id.*

On August 5, 1994, Blankenship filed a complaint against the respondents, alleging various state-law torts as well as violations of Title VII. Blankenship did not claim that she had been constructively discharged, Pet. App. A11, and she made clear during discovery that she was not seeking back pay. Instead, she alleged only that she had suffered emotional distress as a result of Malcom's alleged harassment and that the nursing home was liable for these damages. C.A. App. 76.

Judge Sandra Beckwith of the United States District Court for the Southern District of Ohio expressed doubt that Malcom's conduct had been "sufficiently severe or pervasive to alter the conditions of [Blankenship's] environment and create an abusive working environment." *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); Pet. App. A30, A40. But Judge Beckwith held that in any event, there was no genuine issue of fact about the respondents' liability for Malcom's alleged misconduct. Because the respondents had implemented "prompt and appropriate" corrective action in response to Blankenship's complaints, they were not liable under Title VII. *Id.* at A39. The District Court therefore entered summary judgment for the respondents, and the Sixth Circuit affirmed.

REASONS FOR DENYING THE WRIT

It is undisputed that Malcom, a janitor, had no supervisory power over Blankenship, and Blankenship did not allege *quid pro quo* harassment. Rather, Blankenship alleged that Malcom, a co-worker, created a hostile work environment. Pet. App. A7. Blankenship concedes that in such cases an employer is not liable unless it failed to take prompt and appropriate corrective action after having actual or constructive notice of the harassment. Pet. 11-12. It is undisputed that the respondents did not have actual or constructive notice of Blankenship's alleged harassment until she complained to Sullivan on October 3, 1993, and that the

relevant supervisory personnel — all of whom were women — took prompt action in response to Blankenship's complaint. Accordingly, the sole question is whether the particular steps taken in response to Blankenship's complaint were "appropriate" under all the circumstances of this case. After reviewing the record, the lower courts properly found no genuine factual dispute on this point. This conclusion does not implicate any circuit split, and there is no reason for this Court to second guess the lower courts' view of the record.

I.

THIS CASE DOES NOT IMPLICATE ANY CIRCUIT SPLIT.

The federal circuits uniformly have held that employers are not strictly liable for hostile-environment harassment perpetrated by a co-worker without supervisory power over the victim. Instead, under the circumstances of this case, the employer is not liable unless it "failed to implement prompt and appropriate corrective action" after it knew or should have known of the alleged sexual harassment. *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997). This was the standard that Judges Engel and Merritt invoked in their opinions below. *See Blankenship v. Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997); *id.* at 875 (Merritt, J., concurring). It also matches the rules used in every other circuit for cases of co-worker sexual harassment. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990); *Andrade v. Mayfair Mgt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996); *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997); *McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 480 (7th Cir. 1996); *Davis v. Tri-State Mack Distributors, Inc.*, 981 F.2d 340, 343 (8th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984); *Yamaguchi v. Department of the Air Force*, 109 F.3d 1475, 1483 (9th Cir.

1997); *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 171 (10th Cir.), *cert. denied*, 117 S. Ct. 437 (1996); *Kilgore v. Thompson & Brock Mgt., Inc.*, 93 F.3d 752, 753 (11th Cir. 1996).

Blankenship acknowledges this consistency among the federal circuits. Pet. 11. She maintains, however, that the opinions below nonetheless create a circuit split. According to Blankenship,

> the federal courts of appeal have been almost unanimous in holding that, once an employer is on notice of offensive conduct, that employer must take *reasonable* steps to stop the harassment.

Id. By contrast, Blankenship argues that under the opinions below, " 'reasonableness' did not enter into the equation at all." *Id.* at 7. In her view, the Sixth Circuit has now held that even if an employer's response is obviously inadequate under the circumstances, it is "appropriate" as long as it was undertaken in subjective "good faith." *Id.*

The opinions below do not support Blankenship's interpretation. Judge Engel's opinion indicated that an employer will be liable for co-worker sexual harassment "if its response manifests indifference *or unreasonableness* in light of the facts the employer knew or should have known." Pet. App. A9 (emphasis added). While Judge Engel did refer to "good-faith remedial action," he did not say that this was a purely subjective concept. *Cf. United States v. Leon*, 468 U.S. 897, 924 (1984) (discussing "objective good faith"). To the contrary, Judge Engel specifically stated that an employer will be liable for co-worker sexual harassment if its response is sufficiently weak, in light of the known facts, to "indicate an attitude of permissiveness" toward harassment. Pet. App. A10. For instance, regardless of the nursing home's subjective good faith, Judge Engel stated

that if Malcom's harassment of Blankenship had been more severe than it actually was, and if Malcom had not heeded the warning that he received on October 18, then the nursing home "might have been under a duty to prevent Malcom from being near Blankenship" and "might have been under a duty to fire him." *Id.* at A13. Under the undisputed facts of this case, however, Judge Engel concluded that the nursing home's response to Blankenship's allegations "was entirely sufficient to escape liability under the ['prompt and appropriate corrective action'] standard." *Id.* at A9.

Judge Merritt's separate concurrence lends the proper perspective to the isolated snippets that the petition excises from Judge Engel's opinion, which was the opinion of the court only because Judge Merritt joined it. Judge Merritt stressed that he did not understand the majority opinion to immunize all employers who act in subjective "good faith" or who do not intentionally condone sexual harassment. Indeed, he noted that Judge Engel's references to "good faith" (like his own references to "deliberate indifference") were simply "shorthand rhetorical characterization[s]" that did not carry independent legal significance. As Judge Merritt concluded, "whatever label we put upon it — negligence, recklessness, intentional, good faith, bad faith, and so on" — the proper standard is simply whether "the employer knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." 123 F.3d at 875 (Merritt, J., concurring) (quoting *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 170 (1996)). It is not surprising, then, that district courts within the Sixth Circuit do not appear to share the petition's interpretation of the opinions below. *See Cole v. Knoll, Inc.*, 1997 U.S. Dist. LEXIS 19927 at *52 (W.D. Mich. Oct. 7, 1997).

In sum, the decision under review does not create any split among the circuits. The opinions below apply the same

requirement of "prompt and appropriate corrective action" used elsewhere. The petitioner simply wants this Court to review the application of that well-established requirement to the particular facts of this case.[3]

II.

THE QUESTIONS PURPORTEDLY RAISED BY THE PETITION MAKE NO DIFFERENCE TO THE OUTCOME OF THIS CASE.

Even had the petition correctly interpreted the opinions below, the questions raised by the petition make no difference to this case. Even Judge Ryan — who *concededly* applied the standard favored by the petitioner, *see* Pet. 9 — agreed that "as a matter of law, defendants responded reasonably to plaintiff's allegations of sexual harassment by her coworker." Pet. App. A20.

This conclusion is correct. It is undisputed that upon receiving Blankenship's initial complaint on October 3, the nursing home took immediate action to separate Malcom from Blankenship, to protect Blankenship from further harassment, and to monitor the situation closely. The nursing home also conducted an immediate investigation of Blankenship's

3. Even if one accepted the petition's interpretation of the opinions below, the petition would still fail to demonstrate a circuit split. At most, the petition claims that the Sixth Circuit has been inconsistent about what constitutes "prompt and appropriate corrective action." After all, past Sixth Circuit opinions have stated that employers must respond "adequately" (and not simply in subjective good faith) after receiving actual or constructive notice of sexual harassment. *See, e.g., Wathen v. General Electric Co.*, 115 F.3d 400, 407 (6th Cir. 1997); *Fleenor*, 81 F.3d at 50. If the Sixth Circuit agrees with the petitioner's interpretation of the opinions below, it can readily use the mechanism of *en banc* review to resolve any internal tensions in its precedent.

allegations, but was unable to find any corroborating witnesses. The nursing home nonetheless provided Blankenship with a parking-lot escort and repeatedly checked whether Malcom was causing trouble. After surveying the record, Judge Engel properly concluded that under the circumstances, "there was little else, if anything, [the nursing home] could do." Pet. App. A9. As the District Court agreed, the nursing home's response "must be deemed reasonable under the circumstances." Pet. App. A38.

To be sure, Blankenship maintains that the nursing home's initial response did not stop the harassment. According to Blankenship, Malcom grabbed her breasts approximately one week after her initial complaint, and he asked her for a date on October 12. But only one day after Blankenship submitted her second written complaint (which described the request for a date but omitted the breast-grabbing incident), the nursing home gave Malcom a stern warning and threatened him with termination if he ever again harassed an employee. The nursing home issued this disciplinary warning even though Malcom denied having harassed Blankenship. It is undisputed that after the warning, Blankenship reported no more harassment.

Blankenship suggests that on October 22, the nursing home should nonetheless have promised to take (unspecified) steps to ensure that she did not have contact with Malcom in the future. *See* Pet. 15. This case does not present that issue, because Blankenship did not allege damages stemming from wrongful termination. Because Blankenship's resignation on October 22 must be presumed voluntary, and because Blankenship had no further contact with Malcom after that date, she cannot claim to have suffered any damages from the nursing home's conduct on October 22.

But in any event, the mere fact that Malcom was in Blankenship's vicinity on October 22 did not constitute

misconduct on his part. As Judge Engel noted, "[t]he workplace involved here was relatively intimate" and employees almost inevitably came into contact with each other. Pet. App. A12. In her meeting with the nursing home's all-female management on October 22, Blankenship herself said that Malcom did nothing improper toward her after October 12, when he allegedly had asked her for a date. *See id.* at A5; *see also* C.A. App. 395, 438-40, 580-81. Because Malcom had not been accused of any further untoward conduct after being warned, "there was nothing to merit further censure by [the nursing home]." Pet. App. A12. Given the particular facts of this case — including the nature of Blankenship's allegations against Malcom and the fact that, according to Blankenship's own report, the nursing home's response had been effective in stopping any misconduct — "[p]reventing Malcom from coming near Blankenship was not yet a necessary step." *Id.* at A13; *see also, e.g., Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 718 (3d Cir. 1997) (rejecting "the proposition that it is always illegal for an employer to require a prior victim of sexual harassment to return to work in the company of co-workers responsible for the prior harassment"); *Zirpel v. Toshiba America Information Systems, Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (affirming summary judgment for employer).

III.

THERE IS NO REASON TO HOLD THE PETITION FOR *FARAGHER V. CITY OF BOCA RATON*, NO. 97-282.

Finally, there is no reason for this Court to hold the petition pending the decision in *Faragher v. City of Boca Raton*, No. 97-282. Indeed, the petition properly refrains from citing *Faragher* at all, because *Faragher* raises entirely different issues.

In *Faragher*, two lifeguards alleged that they had been sexually harassed not by a mere co-worker, but by their

supervisors. Circuits have divided over the extent to which an employer is liable for a hostile work environment created by an employee's supervisor, to whom the employer has delegated power over the employee. This Court therefore granted certiorari to decide whether an employer is "responsible for hostile-environment sexual harassment committed by supervisory employees who use their supervisory status to effect harassment." *Faragher v. City of Boca Raton*, No. 97-282, Petition for Certiorari at i. But this question has no relevance to the present case. As a janitor, Malcom had no "supervisory status"; the nursing home had not given him any supervisory power over Blankenship, and there is no question about whether the nursing home should be liable for the misuse of that power. The present case simply does not raise the question that divided the circuits in *Faragher*. As noted above, when the person responsible for the creation of a hostile work environment is a co-worker rather than a supervisor, every circuit has permitted employers to avoid liability by taking appropriate corrective action.[4]

The *Faragher* case also raises questions about the circumstances in which an employer should be deemed to have constructive knowledge of the alleged harassment, and the Court granted certiorari on that issue too. *Id.* Again, however, that issue

4. The petition incorrectly suggests that the Seventh Circuit recently described the case law in this area as "chaotic" and invited this Court to restore "order." *See* Pet. 18-19 (quoting *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 494-95 (7th Cir. 1997), *petitions for cert. filed* (Nos. 97-569 and 97-799)). The passage quoted by the petition was discussing "the proper standard for evaluating an employer's liability for sexual harassment by a *supervisory* employee." *See Jansen*, 123 F.3d at 494 (emphasis added). By way of contrast, Chief Judge Posner's separate opinion noted the unanimity with which his colleagues approach *co-worker* harassment cases, and explicitly stated that "the cases in which the issue is the employer's liability for harassment by co-workers are the easy ones." *Id.* at 511 (Posner, C.J., concurring and dissenting).

has no relevance to the present case. Here, it was undisputed that Blankenship had put the nursing home on notice of the alleged harassment on October 3, 1993. As the Sixth Circuit explicitly noted, this case did not involve any question of notice, but instead turned entirely on whether the corrective action taken by the nursing home in response to that notice was "appropriate." *See* Pet. App. A8. *Faragher* has no bearing on that question. Accordingly, whatever result the Court reaches in *Faragher* will not affect this case, and there is no reason for the Court to delay disposing of the petition.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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(3)

No. 97-906

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

LEANNA C. BLANKENSHIP,
Petitioner,

v.

PARKE CARE CENTERS, INC., doing business as Barbara Parke Convalescent Center, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF HER PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In their opposing brief, respondents argue that the Sixth Circuit's opinion below does not create any split among the circuit courts because, in finding that respondents were not liable for the sexual harassment suffered by petitioner, the majority utilized the well-established rule that "the employer is not liable unless it failed to implement prompt and appropriate corrective action once it learned of the harassment." (Respondents' Brief at 6.) Because this issue is central to this petition, and because respondents have grossly distorted the Sixth Circuit's opinion in this regard, petitioner will briefly address respondents' argument in this reply memorandum.

In addition, respondents assert that this Court's recent decision to grant certiorari in *Faragher v. City of Boca Raton*, No. 97-282, "has no relevance to the present case" because *Faragher* deals with employer liability in the context of alleged hostile environment sexual harassment committed by a supervisor, not a co-worker as is alleged in the instant case. (*Id.* at 12.) However, as discussed below, petitioner submits that the present case is the perfect companion to *Faragher* as it provides this Court with the opportunity to definitively resolve the issue of employer liability in both supervisor and co-worker hostile environment cases.

ARGUMENT

A) Despite Respondents' Assertion To The Contrary, The Sixth Circuit's Holding That The Employer's Conduct Must Be More Culpable Than "Mere Negligence" Before The Employer May Be Held Liable Under Title VII For Failing To Take Prompt And Appropriate Corrective Action Is In Conflict With Virtually All Of The Other Circuit Courts Which Have Addressed This Issue.

Respondents would have this Court believe that the Sixth Circuit's opinion below was in the mainstream of Title VII jurisprudence when it held that the nursing home was not liable for Walter Malcolm's harassment of petitioner because the circuit court found that the nursing home took prompt and appropriate corrective action when it learned of Malcolm's harassment. (Respondents' Brief at 6; Pet. App. A8.) What respondents fail to discuss, however, is the manner in which the circuit court construed and applied this "prompt and appropriate" rule, which is contrary to the reasoning of virtually every other circuit court which has addressed this issue. As discussed below, the Sixth Circuit effectively created a new standard by which the appropriateness of an employer's response to claims of co-worker sexual harassment is measured.

The majority opinion expressly found that "mere negligence" was not sufficient to impose liability on an employer when that employer is fashioning a remedy in response to a complaint of co-worker hostile environment sexual harassment. As Circuit Judge Engle wrote for the majority:

> Once an employer is aware of and responds to charges of sexual harassment ... mere negligence

> as to the content of the response cannot be enough to make the employer liable.
>
> ★★★
>
> In sum, although negligence as to the existence of harassment may be enough under *Rabidue [v. Osceola]* for an employer to incur liability for discrimination, negligence in the fashioning of the remedy is not.

(Pet. App. A10.)

Similarly, Judge Merritt wrote in his concurring opinion:

> The standard seems to me somewhere in between "negligence" and "intentional" wrongdoing. Perhaps we could call it deliberate indifference.... (*Id.* at A14.)

Accordingly, the majority plainly held that negligence on the part of the employer in responding to a complaint of co-worker sexual harassment is simply not enough to impose liability on that employer and any contrary interpretation is simply unsupportable by the opinions authored below.

Indeed, although respondents assert that "district courts within the Sixth Circuit do not appear to share the petition's [*sic*] interpretation of the opinions below" (Respondents' Brief at 8),[1] the fact is that the district court in *Alton v. The Board of*

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[1] The case cited by respondents as support for this statement, *Cole v. Knoll, Inc.*, 1997 U.S. Dist. LEXIS 19927 (W.D. Mich. Oct. 7, 1997), does not even discuss the standard of liability to be applied when analyzing an employer's response to a complaint of co-worker sexual harassment because the plaintiff's Title VII claim was dismissed for failure to file an EEOC charge. *Id.* at ★★ 23-24. Instead, the *Cole* court cited the majority opinion below for the unremarkable proposition that an employer is legally obligated to investigate

Education of Boyne City Public Schools, 1997 U.S. Dist. LEXIS 20046 (W.D. Mich. Nov. 24, 1997) cited and wholly adopted the majority's opinion below and applied it to claims of sexual harassment asserted under Title IX. *Id.* at ★★ 22-24. The *Alton* court stated:

> If the school board responds with good faith remedial action it cannot be said to have itself committed an act of discrimination. It will be liable under Title IX for student-on-student sexual harassment only if its response exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination.

Id. at ★★ 23-24. In short, petitioner's interpretation of the majority opinion below is in fact shared by at least one district court in this circuit.

Furthermore, despite respondents' assertions to the contrary, the Sixth Circuit's holding below that something more than negligence must be proven before an employer may be held liable for co-worker sexual harassment is in direct conflict with all of the following circuit court decisions: *Carr v. General Motors*, 32 F.3d 1007, 1012 (7th Cir. 1994) (holding that employer's response to complaint of co-worker sexual harassment was inadequate and stating that "[w]e said that the standard was negligence, and we think it plain that negligence was proved")[2]; *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107 (3rd Cir. 1994) ("Courts of appeal that have spoken

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charges of harassment. *Id.* at ★ 52.

[2] In fact, it is because the negligence standard for co-worker harassment is so well-engrained in the Seventh Circuit that Chief Judge Posner referred to these type of cases as "the easy ones." *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 511 (7th Cir. 1997).

readily accept the negligence concept ... if the harassment is reported to the employer); *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995) ("In this circuit ... as in other circuits, remedies should be **reasonably** calculated to end the harassment"); *Accord, Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

Indeed, in *Fuller*, not only did the Ninth Circuit adopt a reasonableness standard for determining whether an employer's response was prompt and appropriate, the court also held that the employer's response must be "effective". 47 F.3d at 1528. The *Fuller* court elaborated on this standard by stating:

> Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment....

Id. Moreover, the Equal Employment Opportunity Commission Guidelines state that, in determining whether an employer's response to a charge of co-worker sexual harassment is appropriate, the Commission should ascertain whether the response "fully remedie[s] the conduct without adversely affecting the terms or conditions of the charging party's employment in some manner...." EEOC COMPLIANCE MANUAL (BNA) § 615.4(a)(9)(iii), ¶ 615:0013, at 59.

In the present case, the nursing home's response to petitioner's complaints of sexual harassment did not end her harassment nor did it deter her harasser. Moreover, petitioner remains baffled as to how it could ever be an appropriate response for an employer to require the victim of sexual harassment to choose between having to continue to work around her harasser or resigning her employment, which were

the only two options presented to petitioner by respondents in the instant case.[3]

In short, the Sixth Circuit's opinion in this case that an employer's response to a complaint of co-worker sexual harassment may be negligent yet nonetheless "prompt and appropriate", is squarely at odds with the majority of the existing Title VII precedent. More importantly, this skewed reasoning affected the outcome of this case. This Court should grant certiorari for these reasons alone.

B) Granting Certiorari In This Case Would Provide This Court With The Perfect Vehicle To Fully And Finally Resolve The Issue Of Employer Liability In Both Supervisor And Co-Worker Hostile Environment Cases Now That Certiorari Has Been Granted In *Faragher*.

As respondents correctly point out in their opposing brief, *Faragher v. City of Boca Raton*, No. 97-282, involves alleged sexual harassment by supervisors and an employer's liability for such alleged harassment. However, petitioner strongly disagrees with respondents' assessment that *Faragher* "has no relevance to the present case" simply because supervisor harassment is alleged in *Faragher*. Indeed, it is precisely because the issue presented in the present case, i.e., the scope of employer liability for co-worker sexual harassment, is missing from *Faragher*, that petitioner submits that this Court

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[3] Although respondents claim that petitioner's resignation "must be presumed voluntary" (Respondents' Brief at 10), the Complaint and Amended Complaint filed by petitioner in this action both clearly allege that respondents "effectively terminated [her] employment when [they] coerced her to write and sign a resignation letter and escorted her out of the facility." Petitioner consistently maintained this position throughout the litigation below.

should also grant certiorari in this case so that the scope of employer liability in all hostile environment cases, including both supervisor and co-worker sexual harassment, may be definitively decided once and for all.

CONCLUSION

For all of the foregoing reasons, and for the reasons previously set forth in her petition, petitioner respectfully submits that her petition should be granted.

Respectfully submitted,

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